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Supreme Court of the United States

OCTOBER TERM, 1936

No. 1

THE ATLANTIC REFINING COMPANY,
Appellant,

vs.

COMMONWEALTH OF VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS
OF THE STATE OF VIRGINIA.

Brief for Appellant

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Supreme Court of the United States

OCTOBER TERM, 1936

No. 40

THE ATLANTIC REFINING COMPANY,
Appellant,

vs.

COMMONWEALTH OF VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS
OF THE STATE OF VIRGINIA.

Brief for Appellant

OPINION BELOW

The opinion of the Supreme Court of Appeals of Virginia is officially reported in Volume 165 of the Virginia Reports beginning at page 492.

JURISDICTIONAL QUESTION

Appellant has heretofore filed, in conformity with Paragraph 1, Rule 12 of the Rules of this Court, its Statement of the grounds on which the jurisdiction of

this Court is invoked. In addition, Appellant has heretofore filed a brief in reply to Appellee's Statement Opposing Jurisdiction. On May 18, 1936, this Court postponed determination of the jurisdictional question raised, and entered the following order:

> "Further consideration of the question of the jurisdiction of this Court in this case is postponed to the hearing of the case on its merits."

The only objection made by Appellee to the jurisdiction of this Court is the assertion that there is no substantial Federal question presented. Appellant respectfully refers the Court to the Statement filed by it pursuant to said Paragraph 1 of Rule 12, and to its brief in reply to Appellee's Statement Opposing Jurisdiction, for the reasons and authorities believed to demonstrate the existence of a substantial Federal question.

This brief will be limited to the merits of the case presented, although there necessarily will be some repetition of the matter heretofore presented on the jurisdictional question.

STATEMENT OF THE CASE

Appellant, a Pennsylvania corporation, engaged in the marketing of gasoline and petroleum products in forty-seven States and several foreign countries, sought in 1930 to procure a certificate of authority to do a local business in the State of Virginia, in conjunction with the interstate business it had theretofore conducted in that State for many years. Through the medium of subsidiary corporations, Appellant had also engaged continuously in intrastate business in the State of Virginia

since 1924, and it was this intrastate business being conducted by its subsidiaries which Appellant desired to take over and operate in its own name, together with its interstate business (R. 27-31).

Before being issued a certificate of authority under date of January 22, 1930, Appellant was required to pay, as a charge for the privilege of doing a local business in Virginia, the $5,000 entrance fee prescribed by an Act of the General Assembly of Virginia approved February 26, 1910.[1] (Said act, the invalidity of which is asserted on this appeal, will hereinafter sometimes be designated as "Section 207".)

Such $5,000 fee was paid by Appellant under protest and duress, and in order to avoid the penalties prescribed by Section 3848 of the Code of Virginia,[2] which said statute provides, among other things, for the imposition of a fine of not less than $10.00 nor more than $1,000.00 for each business transaction within the State by a foreign corporation which has not obtained a certificate of authority, and which further provides that no such corporation shall recover any money or property or enforce any contract in any court without first having obtained said certificate. Appellant also duly complied with the provisions of Section 3847 of the Code of Virginia[3] by

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[1] Acts of General Assembly of Virginia, 1910, Chap. 53, Sec. 38a, p. 79. This statute is now Sec. 207 of the Tax Code of Virginia, as contained in Michie's Code of Virginia, 1930, as amended.

[2] Acts of the General Assembly of Virginia, 1902-3-4, page 360; *ibid*, 1910, p. 425; *ibid*, 1926, p. 481; *ibid*, 1932, p. 407. This act may be found conveniently as Sec. 3848 of Michie's Code of Virginia, 1930, as amended.

[3] Acts of the General Assembly of Virginia, 1902-3-4, p. 360; *ibid*, 1910, p. 422; *ibid*, 1920, p. 565; *ibid*, 1926, p. 482. This act may be found conveniently as Section 3847 of Michie's Code of Virginia, 1930, as amended.

filing authenticated copies of its charter, by presenting to the State Corporation Commission a written power of attorney, and by presenting to that body a certificate from the Comptroller of the State of Virginia showing the payment into the treasury of said $5,000 fee (R. 15, 16, 25).[4]

On January 22, 1930, a certificate of authority to transact business within the State of Virginia was duly issued and delivered to the Appellant, which has, since that date, been engaged continuously in carrying on under its own name the general intrastate business of distributing and selling gasoline and petroleum products which had theretofore been carried on by Appellant's subsidiaries. Moreover, Appellant has continued to carry on within this State its interstate business (R. 16).

Since this appeal involves the validity of said Section 207, under which said sum of $5,000 was collected from Appellant, we shall now set forth in full the provisions of said statute:

> "Every foreign corporation, when it obtains from the State Corporation Commission a certificate of authority to do business in this State, shall pay an entrance fee into the treasury of Virginia to be ascertained and fixed as follows:
>
> "For a company whose maximum capital stock is fifty thousand dollars, or less, thirty dollars;
>
> "For a company whose capital stock is over fifty thousand dollars and not to exceed one million dollars, sixty cents for each thousand dollars or fraction thereof;

[4] It will be noted from page 25 of the Record that the great majority of the allegations in Appellant's original petition were admitted by stipulation in open court.

"Over one million dollars, and not to exceed ten million dollars, one thousand dollars;

"Over ten million dollars, and not to exceed twenty million dollars, one thousand, two hundred and fifty dollars;

"Over twenty million dollars, and not to exceed thirty million dollars, one thousand, five hundred dollars;

"Over thirty million dollars, and not to exceed forty million dollars, one thousand, seven hundred and fifty dollars;

"Over forty million dollars, and not to exceed fifty million dollars, two thousand dollars;

"Over fifty million dollars, and not to exceed sixty million dollars, two thousand, two hundred and fifty dollars;

"Over sixty million dollars, and not to exceed seventy million dollars, two thousand, five hundred dollars;

"Over seventy million dollars, and not to exceed eighty million dollars, two thousand, seven hundred and fifty dollars;

"Over eighty million dollars, and not to exceed ninety million dollars, three thousand dollars;

"Over ninety million dollars, five thousand dollars.

"But foreign corporations without capital stock shall pay fifty dollars only for such certificate of authority to do business in this State.

"For the purpose of this section the amount to which the company is authorized by the terms of its charter to increase its capital stock shall be considered its maximum capital stock." (Acts of 1910, p. 77; now Section 207 of the Tax Code.)

It is apparent from the provisions of the foregoing statute, and has not been disputed in this case, that the amount of the entrance fee charged Appellant by the State of Virginia was determined solely by the amount

of Appellant's total authorized capital stock. The fee so charged Appellant was not based upon or related to the amount of the capital employed or proposed to be employed by the Appellant within the State of Virginia, nor did it have any relation to the value of the privilege or franchise to be exercised by Appellant within that State, or to the amount of business proposed to be done or property owned or proposed to be acquired and used by Appellant in that State (R. 17, 53).

As of January 22, 1930, when the aforementioned certificate of authority was issued to Appellant, the total number of shares of capital stock of Appellant authorized and which might be issued was 4,000,000 shares, all of which was common stock of the par value of $25.00 per share, making a total authorized capitalization of $100,000,000. Of this authorized capital there was issued and outstanding on said date only 2,681,980 shares, having a par value of $67,049,500 (R. 16). At substantially the same time, the total invested capital of the Appellant amounted to $132,196,275, and during the calendar year 1929 its total volume of business aggregated $153,520,041, of which a most substantial part was interstate in character (R. 31).

Of such total invested capital, only $262,580, or approximately one-fifth of one per cent thereof, was invested in Virginia on said date. The volume of business done in said State during the calendar year 1929, including both its interstate and the intrastate business of its subsidiaries, amounted to $1,396,600, or only nine-tenths of one per cent of Appellant's total business for that year. Approximately two-thirds of the business done in Virginia was intrastate, and one-third thereof interstate (R. 31, 32).

The interstate and intrastate business of petitioner and its subsidiaries doing business in Virginia, at all times material hereto, has been conducted by the use of the same terminals, boats, barges, bulk and service stations, tank wagons and other facilities. Further, at all times, with respect to accounting and administrative control and operation there has not been any segregation of expense between interstate and intrastate business, because the same facilities, offices, officers, agents and employees have been engaged in interstate and intrastate business (R. 31, 61).

On April 28, 1930, under and pursuant to the provisions of Section 408 of the Tax Code of Virginia, as amended,[5] Appellant filed its petition with the State Corporation Commission of Virginia, asserting therein that Section 207, as applied to it, was unconstitutional and void and claiming a refund of said sum of $5,000 theretofore exacted from it, under protest (R. 46).

The grounds upon which Appellant claimed a refund were: (1) that it had been deprived of the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that the amount of said fee had been measured and determined by Appellant's total capital, representing its property located in other States and countries, and thus beyond the taxing jurisdiction of Virginia; (2) that it had been denied the equal protection of the laws guaranteed by said Amendment, in that said Section 207 operated arbitrarily and unequally as between foreign corporations seeking the same privilege within the State of Virginia; and (3) that

[5] Acts of the General Assembly of Virginia, 1930, p. 917; Section 408 of the Tax Code of Virginia, Michie's Code, 1930, as amended.

the imposition of said $5,000 charge unlawfully burdened interstate commerce, in that the amount thereof was measured and determined by Appellant's total capital, representing its interstate as well as its intrastate business (R. 19, 49).

After two hearings, and following the taking of the case under advisement for more than a year after the second hearing, the State Corporation Commission entered a final order on November 14, 1934, denying and dismissing said petition for a refund (R. 44). At the same time the Commission handed down a so-called opinion, 162 printed pages long (R. 45-207), in which it held that Section 207 as applied to Appellant violated no provision of the Constitution.

An appeal from said final order of the State Corporation Commission to the Supreme Court of Appeals of Virginia was awarded Appellant by that court on May 8, 1935 (R. 13). The three principal assignment of errors relied upon were that the Commission had erred in failing to hold that the statute in question, as applied to Appellant, denied it due process and equal protection of the laws, and infringed the commerce clause of the Constitution of the United States, all as aforesaid (R. 9).

Each of these assignments of errors was relied upon by Appellant before the Supreme Court of Appeals of Virginia, both in its brief and in oral argument. That court, in its opinion and final judgment rendered and entered on January 16, 1936, and here appealed from, affirmed the judgment of the State Corporation Commission and expressly sustained the validity of Section 207 of the Tax Code, and of the imposition made thereunder upon the Appellant (R. 208, 208-218).

SPECIFICATION OF ERRORS RELIED UPON

1. That the Supreme Court of Appeals of Virginia erred in giving judgment affirming the judgment of the State Corporation Commission and in sustaining the validity of an Act of the General Assembly of Virginia, approved February 26, 1910. (Acts of the General Assembly of Virginia, 1910, Chapter 53, Section 38a, page 79; Section 207 of the Tax Code of Virginia, Michie's Code of Virginia, 1930.)

2. That the Supreme Court of Appeals of Virginia erred in failing to hold that the enforcement of said Act deprived the Appellant of its property without due process of law in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States.

3. That the Supreme Court of Appeals of Virginia erred in failing to hold that the enforcement of said Act constituted an illegal and an unlawful interference with and burden upon the Appellant's Interstate Commerce in contravention of Clause 3, Section 8, Article I of the Constitution of the United States.

4. That the Supreme Court of Appeals of Virginia erred in failing to hold that the enforcement of said Act denied the Appellant the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States.

SUMMARY OF ARGUMENT

The fee imposed upon Appellant under Section 207 of the Tax Code of Virginia is measured solely by Appellant's authorized capital stock, which represents its property located in forty-seven States and several foreign countries, as well as its property used in both inter-

state and intrastate commerce. There is no apportionment of said fee to local business or property, and its amount bears no relation whatever to the privilege sought to be taxed, namely, the entering of the State of Virginia to do a local business.

Accordingly, Appellant submits that the imposition of the fee prescribed by said statute:

1. Deprived Appellant of its property without due process, since the amount of such fee was measured and determined by property beyond the taxing jurisdiction of the State. *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460; *Frick* v. *Pennsylvania,* 268 U. S. 473; *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203; *Locomobile Co.* v. *Massachusetts,* 246 U. S. 146; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135; *Looney* v. *Crane Co.,* 245 U. S. 178; *Ludwig* v. *Western Union Tel. Co.,* 216 U. S. 146; *Pullman Co.* v. *Kansas,* 216 U. S. 56; *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1.

2. Unlawfully burdened interstate commerce, because the amount of said fee was measured and determined by Appellant's total capital, representing its interstate, as well as its intrastate, business in forty-seven States, and several foreign countries. *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460; *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203; *Locomobile Co.* v. *Massachusetts,* 246 U. S. 146; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135; *Looney* v. *Crane Co.,* 245 U. S. 178; *Ludwig* v. *Western Union Tel. Co.,* 216 U. S. 146; *Pullman Co.* v. *Kansas,* 216 U. S. 56; *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1.

3. Denied Appellant the equal protection of the laws, because said statute operated arbitrarily and unequally as between Appellant and other foreign corporations seeking the same privilege within the State. *Air-Way Electric Appliance Corp.* v. *Day,* 266 U. S. 71.

Said Section 207 of the Tax Code of Virginia was before this Court in the case of *General Railway Signal Co.* v. *Virginia,* 246 U. S. 500 (1918), and was there upheld although admitted to be on the "border line." However, the only question then presented to, or considered by, this Court was whether interstate commerce was burdened. Accordingly, that case constitutes no precedent upon the two additional questions here raised, namely, that as applied to Appellant, said statute operated to deny due process and equal protection of the laws.

In any event, however, the *Railway Signal Company Case* no longer constitutes a persuasive precedent even on the issue of burdening interstate commerce. Subsequent decisions of this Court have "expressly disapproved" *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68 (1913), upon the authority of which the *Railway Signal Company Case* was decided; and such subsequent decisions have also denied effect to the two "characteristics" of the Virginia statute said to save its validity in 1918. *Cudahy Packing Co.* v. *Hinkle, supra; Alpha Portland Cement Co.* v. *Massachusetts, supra.*

Moreover, since the decision of the *Railway Signal Company Case,* this Court has held for the first time that statutes of this type deny foreign corporations the equal protection of the laws. *Air-Way Electric Appliance Corporation* v. *Day, supra.*

Therefore, Appellant respectfully submits that said Section 207 is repugnant to three separate and distinct mandates of the Constitution of the United States.

In the argument which will now be presented, the denial of due process and the burdening of interstate commerce will, for convenience, generally be treated together in Sections I and II hereof, whereas the denial of equal protection will be discussed under Section III hereof.

ARGUMENT

I.

Historical Development and Analysis of Leading Authorities Supporting Appellant's View as to the Denial of Due Process and Burdening of Interstate Commerce.

(1) General Railway Signal Co. v. Virginia.

In holding that Section 207, as applied to Appellant, was not repugnant to the Constitution of the United States, the Supreme Court of Appeals of Virginia, in its opinion below, relied principally upon the decision in *General Railway Signal Co.* v. *Virginia,* 246 U. S. 500.[6] That case, decided in 1918, sustained the validity of this same section of the Virginia Tax Code (then designated as Section 38a, Chapter 53, Acts of the General Assembly of Virginia, 1910), holding that the fee imposed upon the General Railway Signal Company for the privilege of doing business in Virginia did not constitute an unlawful burden upon interstate commerce.

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[6] It is interesting to observe that the Virginia Law Review has recently criticized the decision below. In a case note appearing in 22 Virginia Law Review, p. 958, (June, 1936), the following conclusion is reached: "It is believed that the court (Va. Court in Atlantic Refining Co. v. Commonwealth) relied too heavily upon *General Railway Signal Co.* v. *Virginia,* supra, which is practically emasculated by *Alpha Portland Cement Co.* v. *Massachusetts, supra,* and *Cudahy Packing Co.* v. *Hinkle, supra.* The court would have been more in line with later Supreme Court decisions had it held the statute unconstitutional either as an interference with interstate commerce or a denial of due process, and it would seem that a holding that the statute denied equal protection of the laws to foreign corporations would have been justified."

Whether such statute violated the Fourteenth Amendment was not before the Court, since the Signal Company had made no claim, at any stage in the proceedings, that it had been deprived of its property without due process, or that it had been denied equal protection of the laws. The entire opinion of this Court on the validity of the statute in question follows:

> "It is further insisted that as the amount of prescribed entrance fee is based upon maximum capital stock it constitutes a burden on interstate commerce, contrary to the Federal Constitution.
>
> "Section 38a, c. 53, Acts of Virginia, 1910 (copied in margin) requires every foreign corporation with capital over one million and not exceeding ten million dollars when it obtains a certificate of authority to do local business to pay a fee of one thousand dollars. Inspection of the statute shows that the prescribed fees do not vary in direct proportion to capital stock and that a maximum is fixed. In the class to which plaintiff in error belongs the amount specified is one thousand dollars, and, under all the circumstances, we cannot say this is wholly arbitrary or unreasonable.
>
> "Considering what we said in *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350; *Kansas City, Fort Scott and Memphis Ry. Co.* v. *Kansas*, 240 U. S. 227; *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles*, 242 U. S. 111, the two characteristics of the statute just referred to must be regarded as sufficient to save its validity. It seems proper, however, to add that the case is on the border line. See *Looney* v. *Crane Co.*, 245 U. S. 178; *International Paper Co.* v. *Massachusetts*, *ante*, 135, and *Locomobile Co.* v. *Massachusetts*, *ante*, 146."

It will be observed from the foregoing that the provision in the Virginia statute for a maximum limit, and the fact that the fee prescribed by it did not vary in direct proportion to the authorized capital stock, were regarded in 1918 as "two characteristics * * * sufficient to save its validity." Yet even their presence did not keep the case from being on the "border line".

Although *General Railway Signal Co.* v. *Virginia, supra,* has not been expressly overruled,[7] Appellant contended before the State Corporation Commission and the Supreme Court of Appeals of Virginia, and now urges on this appeal that the subsequent decisions of this Court in *Air-Way Electric Appliance Corporation* v. *Day,* 266 U. S. 71 (1924), *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203 (1925), and *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460 (1929), compel the conclusion that Section 207 is invalid today as applied to Appellant.

Before discussing these subsequent decisions, it is illuminating to consider the state of the law as it existed in 1918 when the *General Railway Signal Company Case* was decided. Such consideration is necessary to an appreciation of the controlling weight attributed at that time to the presence in these statutes of provisions for "reasonable maximum limits."

The earliest Supreme Court decisions squarely pass-

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[7] Nor has it ever been cited or followed by the United States Supreme Court on the constitutional question here in issue. The Supreme Court of Appeals of Virginia, in the opinion here appealed from, erroneously states that the *General Railway Signal Company Case* was followed on the question here in issue in *Western Gas Construction Co.* v. *Virginia,* 276 U. S. 597. The only question presented to this Court, or in any way involved in that case, was whether the Construction Company was doing an intrastate business within Virginia.

ing upon the validity of a privilege tax imposed upon foreign corporations and measured by total authorized capital stock are believed to be *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1 (1910), *Pullman Co.* v. *Kansas,* 216 U. S. 56 (1910), and *Ludwig* v. *Western Union Telegraph Co.,* 216 U. S. 146 (1910). In each of these three decisions, the State statute before this Court was held unconstitutional as the same was applied to the public service corporations involved.

Three years later, in *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68 (1913), this Court upheld the Massachusetts statute imposing a privilege tax upon foreign corporations measured by total authorized capital stock, where the same contained a provision for a maximum limit to the tax. The earlier cases above mentioned were distinguished upon the ground that the Telegraph Company and the Pullman Company were engaged in the business of "commerce itself," whereas the Baltic Mining Company, a mere private concern, was not so engaged. They were further distinguished by emphasizing that, unlike the Kansas and Arkansas statutes involved in the earlier cases, the Massachusetts statute in the *Baltic Mining Company Case* contained a provision limiting "the tax to a maximum of $2,000."

The line of demarcation between valid and invalid privilege taxes imposed upon foreign corporations and measured by total authorized capital stock, was more sharply drawn by five cases decided by this Court during its 1917 term. *Looney* v. *Crane Co.,* 245 U. S. 178 (1917); *International Paper Co.* v. *Massachusetts,* 246 U. S. 135 (1918); *Locomobile Co.* v. *Massachusetts,* 246 U. S. 146 (1918); *Cheney Bros. Co.* v. *Massachusetts,* 246 U. S. 147 (1918); and *General Railway Signal Co.* v. *Virginia, supra.*

In three of these, where no provision for a reasonable maximum charge was made, the statutes were held unconstitutional as burdening interstate commerce and as in effect taxing property beyond the jurisdiction of the States in question.[8] In the *Cheney Bros. Company* and *General Railway Signal Company Cases,* however, the statutes were sustained where each contained a provision fixing a maximum limit charge.

It is important to note the controlling effect given by this Court in 1918 to the presence or absence of a provision for a reasonable maximum limit on the fee prescribed. The *Cheney Bros. Company Case* involved the *identical* Massachusetts statute upheld in *Baltic Mining Co.* v. *Massachusetts, supra,* and that precedent was squarely followed:

> "Bearing in mind that the tax of which these corporations are now complaining was imposed under the statute as it stood in 1913, *which was before the maximum limit was removed,* it follows from our decision in *Baltic Mining Co.* v. *Massachusetts* that the several objections based on the Constitution of the United States are all untenable * * *." (Italics supplied.)[9]

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[8] *Looney* v. *Crane Co., supra, International Paper Co. v. Massachusetts, supra,* and *Locomobile Co.* v. *Massachusetts, supra.* It should also be noted that these cases, involving as they did ordinary commercial corporations, disposed of the assumption then being made by many of the State courts that the doctrine of *Western Union Telegraph Co.* v. *Kansas, supra,* was applicable only to public service corporations. Cf. *General Railway Signal Co.* v. *Virginia,* 118 Va. 301; and see, Powell, The Commerce Clause and State Tax Power, 22 Columbia Law Review 133, at p. 146.

[9] *Cheney Bros. Co.* v. *Massachusetts,* supra, at page 157.

The same Massachusetts statute, after the removal of the provision for a maximum limit, was sought to be applied to the two appellants in the *International Paper Company* and *Locomobile Company Cases. This single change in the statute was held sufficient to render it unconstitutional.* Mr. Justice VanDevanter, speaking for the Court in the *Locomobile Company Case,* said:

> "The tax is of a designated percent of the entire authorized capital, and *was imposed after the maximum limit* named in St. 1909, c. 490, part III, Section 56, *was removed* by Stat. 1914, c. 724, Section 1. As thus changed the statute is in its essence and practical operation indistinguishable from those adjudged invalid in *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1; *Pullman Co.* v. *Kansas,* 216 U. S. 56; *Ludwig* v. *Western Union Telegraph Co.,* 216 U. S. 146, and *Looney* v. *Crane Co.,* 245 U. S. 178. This we have just decided in *International Paper Co.* v. *Massachusetts, ante,* 135." (Italics supplied.)

Thus, at the time *General Railway Signal Co.* v. *Virginia, supra,* was decided a few weeks following the foregoing decisions, this Court was apparently committed to the doctrine that a statute imposing a privilege tax upon foreign corporations and measured by total authorized capital stock was valid or invalid depending upon the presence or absence of a provision therein limiting the charge to a reasonable maximum amount. Since the Virginia statute involved in the *Signal Company Case* had such a maximum limit provision, this Court followed *Baltic Mining Co.* v. *Massachusetts, supra,* just as it had done in the *Cheney Bros. Case.*

In addition to relying upon the provision for a maximum limit in the Virginia statute, this Court in the *Signal Company Case* also said that the failure of the Virginia imposition to vary directly with the amount of capital stock was a "characteristic" which saved the statute from the unconstitutional side of the "border line."

As will now be pointed out, both of these "saving" characteristics have been abandoned by the subsequent decisions of this Court.

(2) The Controlling Case of Cudahy Packing Co. v. Hinkle.

The first clear departure from the view that the presence of a reasonable maximum limit would save an excise otherwise objectionable came seven years later in *Alpha Portland Cement Co.* v. *Massachusetts, supra.* There the company in question was engaged only in interstate commerce and the tax was measured by a combination of the total value of the capital shares attributed to transactions in Massachusetts and the proportion of net income attributed to such transactions. Hence, the case upon its facts is of no particular present significance. However, the argument was advanced, based upon *Baltic Mining Co.* v. *Massachusetts, supra,* that since the tax rate was small there was no unconstitutional burden upon interstate commerce. In disposing of this argument, the Court said:

> "It must now be regarded as settled that a State may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the Commerce

> Clause; and the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction. *The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of Baltic Mining Co.* v. *Massachusetts, 231 U. S. 68, 87, tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved."* (Italics supplied.)

Since no tax upon the privilege of doing an intrastate business measured by authorized capital stock was involved, the language above quoted from the *Alpha Portland Cement Company Case* has no controlling significance in itself. Yet such language is important because it represents the first authoritative declaration that any part of the *Baltic Case* was expressly and "definitely disapproved." The scope of this disapproval and whether it extended to an excise on a foreign corporation for the privilege of doing an intrastate business, when measured by authorized capital stock but with a maximum limit, remained undecided until 1929.

In that year in the controlling case of *Cudahy Packing Co.* v. *Hinkle, supra,* this precise question was before the Supreme Court for the first time since *Baltic Mining Co.* v. *Massachusetts, supra, Cheney Bros. Co.* v. *Massachusetts, supra,* and *General Railway Signal Co.* v. *Virginia, supra.* And up to that time no such statute *containing a maximum limit* had been struck down by the Supreme Court.[10]

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[10] Counsel for the State of Washington correctly said in their argument: "This court has never held invalid an excise graduated in accordance with the authorized capital stock of the corporation, where the corporation was engaged in intrastate business and where a reasonable maximum fee was provided for in the statute."

The decision to be announced in the *Cudahy Packing Company Case* had been foreshadowed, however. The broad base of principle had been cut from beneath the *Baltic Case* by the decisions in the *International Paper Company, Locomobile Company* and *Looney Cases,* leaving that case an illogical exception to the general rule; *General Railway Signal Co.* v. *Virginia, supra,* which had been decided upon the authority of the *Baltic Case,* had admittedly been "on the border line" when handed down in 1918; and *Alpha Portland Cement Co.* v. *Massachusetts, supra,* had given a prophetic warning against the saving efficacy of the characteristic which this Court seven years before had relied upon to distinguish the *Baltic Mining Company, Cheney Brothers Company* and *Signal Company Cases* from the *International Paper Company* and *Locomobile Company Cases.*

The *Cudahy Packing Company* decision held invalid the annual "license fee" and the single "filing fee" imposed by the State of Washington upon foreign corporations for the privilege of doing a local business in that State. The statutes in question were enacted in 1925, several years after the Cudahy Packing Company had first begun its intrastate business in Washington. Like the Virginia fee here in question, both of these Washington impositions were measured by total authorized capital stock, and neither of them varied directly with the amount thereof. Furthermore, the Washington statutes both contained maximum limits of $3,000 each, identical in principle to the $5,000 maximum limit prescribed by the Virginia statute.

The Cudahy Packing Company was a Maine corporation and, also like the Appellant herein, had only a very small percentage of its total business in Washington.

In 1927, that Company increased its authorized capital stock and thereby became liable for the "filing fee", which was a single fee imposed at the time of entrance into the State, and at such times thereafter as the corporation in question increased its authorized capital stock.[11]

An injunction against the imposition of such fee was sought in the District Court, the Packing Company asserting its invalidity upon identically the same grounds now being invoked by Appellant herein.

Squarely following *Baltic Mining Co.* v. *Massachusetts, supra,* which was held not to be overruled by subsequent decisions, two members of the Three-Judge District Court rendered separate opinions sustaining both the Washington filing fee and annual license fee. It appears from these opinions that counsel for the Cudahy Packing Company, because of the presence of a maximum limit in the Washington statutes, admitted the applicability of the *Baltic Case,* but contended that it had been repudiated by later decisions. The third judge sitting on the District Court, Judge Bourquin, demonstrated a keener perception of the moribund condi-

[11] This scheme is precisely paralleled by that in Virginia. Section 207 prescribes the fee charged at the time of entrance and Section 208 of the Tax Code of Virginia (Acts of the General Assembly of Virginia, 1906, p. 573, as amended in 1910, page 77, and as amended in 1926, p. 903) prescribes an additional fee after entrance whenever the foreign corporation increases its authorized capital stock. The schedule of fees contained in Section 207 determines the amount of the entrance fee as well as the amount of the subsequent fee following an increase in authorized capital. Thus, in view of the admitted controlling effect of the *Cudahy Packing Company Case* as to a filing fee imposed after entrance and upon an increase of authorized capital, it is clear that Sections 207 and 208 of the Virginia Tax Code are invalid as applied to increases in authorized capital after entrance.

tion of the *Baltic Case* than did his brethren, and dissented.[12]

When the case reached this Court, the question whether the maximum limits saved the two statutes involved was squarely met. Mr. Justice McReynolds said:

> "*Unless saved by the $3,000 limitation,* the Washington enactments are subject to the constitutional objections pointed out in *Looney* v. *Crane Co.*, and must be denied effect.
>
> "*Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, upheld a tax based upon authorized capital stock, but limited to $2,000, imposed by Massachusetts upon foreign corporations for the privilege of doing local and domestic business therein. Consideration was given to the fact that the corporate assets were four times the authorized capital and to the limitation. Weighing all the circumstances, the court concluded that no direct substantial burden was imposed upon interstate commerce, and that property beyond the State was not taxed.
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> "In *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203, 218, we said:
>
> " 'It must now be regarded as settled that a State may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the commerce clause; and the Fourteenth Amendment does not permit taxation of property beyond the

[12] In so dissenting, Judge Bourquin said: "It will be noted that considerable water has run under the bridge since the *Baltic Case*; and the latter is little more than a relic of a period of spirit and tendencies quite different from todays. That spirit and tendencies to which all courts are more or less responsive." See the case note in 27 Michigan Law Review 108, criticizing the majority opinion of the District Court.

> State's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, 87, tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved.' *Baltic Mining Co.* v. *Massachusetts* had sometimes been regarded as lending support to the theory that a tax which really burdens interstate commerce and reaches property beyond the State may be sustained if relatively small. This view did not harmonize with the principles approved by *Looney* v. *Crane Co.*, and was expressly disapproved by *Alpha Portland Cement Co.* v. *Massachusetts.* It follows that the decree of the court below is erroneous and must be reversed." (Italics supplied.)

Although the majority opinion in the *Cudahy Packing Company Case* did not refer to *General Railway Signal Co.* v. *Virginia, supra,* Mr. Justice Brandeis pointed out in his dissenting opinion that the Washington filing fee held invalid was identical in principle to the entrance fee sustained in the *General Railway Signal Company Case.* Appellant herein concurs in the view that the two impositions are identical in principle, and submits, therefore, that *Cudahy Packing Co.* v. *Hinkle, supra,* requires that Section 207 of the Virginia Tax Code, as applied to Appellant in this case, be held invalid.

Manifestly, the *Cudahy Packing Company Case* completed the interment of the *Baltic Case* with its "maximum limit doctrine." [13]

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[13] For case notes and comments in the Law Reviews recognizing that the Baltic case exception to the doctrine of *Western Union Telegraph Co.* v. *Kansas* "is now definitely disapproved," see: 42 Harvard Law Review 952; 29 Columbia Law Review

Although not expressly mentioned in the opinion, it is equally obvious that such case eliminates any contention that a statute such as Section 207 of the Virginia Tax Code may be valid because the fee imposed does not vary directly with the amount of the authorized capital stock. It will be remembered that the Washington fees held invalid were both graduated in a manner similar to the Virginia fee here in question. They were not determined by a flat percentage of the capital stock as were the fees involved in the earlier decisions hereinbefore discussed.[14]

Thus, both of the characteristics said to save the validity of the Virginia statute in the *Signal Company Case* have been rendered inefficacious by the recent *Cudahy Packing Company Case,* which case, Appellant submits, is so squarely in point as to be determinative of this appeal in its favor.

834; 38 Harvard Law Review 361, 368; 27 Michigan Law Review 108; and see Powell, *op. cit. supra,* at p. 146. For decisions by State courts recognizing the repudiation of the *Baltic Company* doctrine, see *Perkins Manufacturing Co.* v. *Jordan,* 200 Calif. 667, 254 N. W. 551, (1928); *Minneapolis Steel & Machinery Co.* v. *Crockett,* 71 Utah 211, 263 Pac. 926 (1928); *Chicago, etc. Ry.* v. *Harman,* 89 Mont. 1, 295 Pac. 762 (1931); *Montgomery Ward & Co.* v. *Becker,* 334 Mo. 789, 69 S. W. 674 (1934); and *State* v. *Dammann,* 298 Wisc. 265, 224 N. W. 139 (1929).

[14] The unsoundness of a distinction between "a tax that is graduated smoothly as on a percentage basis, and one that is graduated in leaps and bounds" is clearly shown by the Louisiana case of *State* v. *Albert Mackie Co.,* 144 La. 339, 80 Sou. 582 (1919), wherein the *General Railway Signal Company Case* was fully discussed. To the same effect is *St. Louis-Southwestern Rwy. Co.* v. *Emmerson,* 30 Fed. (2d) 322, (C. C. A. 7th-1929), where the district court below, which had followed the *Signal Company Case,* was reversed.

(3) Other Authorities Cited in General Railway Signal Co. v. Virginia.

Counsel for the Commonwealth of Virginia, in the argument below, sought to support the present day soundness of *General Railway Signal Co.* v. *Virginia, supra,* by reliance upon *St. Louis-Southwestern Rwy. Co.* v. *Arkansas,* 235 U. S. 350 (1914), *Kansas City, etc., Rwy. Co.* v. *Kansas (Botkin),* 240 U. S. 227 (1916), and *Kansas City, etc., Railroad Co.* v. *Stiles,* 242 U. S. 111 (1916), which were cited by this Court in the *Signal Company* opinion. Reliance was so placed upon these authorities by opposing counsel because the *Baltic Mining Company Case,* the real parent decision to the *Signal Company Case,* had been expressly disapproved by this Court.

Although the Supreme Court of Appeals of Virginia, in the opinion below, did not mention such authorities, Appellant feels that it is proper to here point out the reasons why the three cases above named have no bearing today on the validity of a charge upon a *foreign corporation* measured solely by authorized capital stock.

St. Louis-Southwestern Railway Co. v. *Arkansas, supra,* may be disposed of briefly. An annual excise was imposed on foreign corporations for the privilege of doing a local business measured by the "proportion of *outstanding* capital stock * * * *represented by property owned and used in business transacted in the State.*" Such a measure studiously avoids any reference to extra-state property or to property used in interstate commerce; furthermore, since outstanding rather than authorized capital stock is used, it avoids the vice condemned in

Air-Way Elec. Appliance Corporation v. *Day, supra.* These are characteristics of a valid tax upon the privilege of doing a local business according to present day standards, and are conspicuous by their absence from the Virginia law. The opinion below by the State Corporation Commission recognized the vital differences between the Arkansas and the Virginia statutes, and frankly admitted that such case is "irrelevant."

The two remaining cases cited, *Kansas City, etc., Railway Co.* v. *Kansas (Botkin), supra,* and *Kansas City, Memphis & Birmingham Railroad Co.* v. *Stiles, supra,* while perhaps persuasive to some extent in the year 1918, have since definitely been removed as authorities pertinent to the validity of Section 207.

In the first place, it must be remembered that these two cases were both decided in 1916 when the scope of the recently announced doctrine of *Western Union Telegraph Co.* v. *Kansas, supra,* was not only undefined, but had been recently confused by the *Baltic Mining Company* decision.

Also the magic of the "smallness" of the imposition had not yet been dispelled by the later decisions in the *Alpha Portland Cement Company* and *Cudahy Packing Company Cases.* A $2,500 maximum limit was involved in the *Botkin Case,* and Mr. Justice Hughes expressly followed the *Baltic* doctrine, since repudiated, that a reasonable maximum limit saves a tax measured in part by property beyond the taxing power of the State, and used in interstate commerce. And although no such limit was prescribed in the Alabama statute sustained in the *Stiles Case,* this Court commented upon the reasonableness of the amount.

Another factor present in both the *Botkin* and *Stiles Cases,* which tends to eliminate them as persuasive precedents, is that the impositions in both cases were measured by issued and outstanding capital stock rather than total authorized capital stock. As early as 1916 the courts had not become as articularly conscious of the unreasonableness of measuring a tax by *authorized* capital as they have in more recent years. See *Air-Way Electric Appliance Corporation* v. *Day, supra,* and compare *Western Cartridge Co.* v. *Emmerson,* 281 U. S. 511 (1930). In *International Shoe Co.* v. *Shartel,* 279 U. S. 429, 433 (1929), where a franchise tax measured by outstanding capital stock and apportioned to the property owned in the State was sustained, Mr. Justice Stone was careful to say:

> "The tax is distinguishable from those considered in *Air-Way Electric Appliance Corporation* v. *Day,* 266 U. S. 71; *Looney* v. *Crane Co.,* 245 U. S. 178, and *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460, which either were measured by authorized instead of issued capital stock or were not limited to the part of the capital stock justly apportioned to the taxing state."

Finally, it is of the utmost significance in determining the weight of the *Botkin* and *Stiles Cases* as authorities supporting *General Railway Signal Co.* v. *Virginia, supra,* that *domestic* rather than *foreign* corporations were involved in both of them. The impositions sustained were annual franchise taxes upon *domestic* corporations measured by issued and outstanding capital stock. Because of a State's peculiar control and dominion over

corporations of its own creation, this Court has allowed unusual latitude in the taxation of the right to be a corporation and enjoy the franchise granted by the State of its incorporation. A part of this franchise is the right to issue stock, whereas the so-called franchise granted a foreign corporation to do a local business does not and cannot include such right. Thus, there *may* be a relation between the privilege conferred and the measure of the tax where a franchise tax on *domestic corporations* is measured by the amount of authorized capital stock, whereas there can be no such relation in the case of a tax upon *foreign corporations* measured by authorized capital stock.

This distinction was clearly brought out by Mr. Justice Stone's opinion in *Roberts & Schaffer Co.* v. *Emmerson,* 271 U. S. 50 (1926), where a *domestic* corporation sought in vain to invoke the doctrine of *Air-Way Electric Appliance Corporation* v. *Day, supra.*

Even as early as 1918 this distinction between foreign and domestic corporations must have been clearly recognized because otherwise it is difficult to reconcile the *Stiles Case* where no maximum limit was involved with the *Looney, International Paper Company,* and *Locomobile Company Cases, supra.* The *only* differences between the three cases last mentioned and the *Stiles Case* were (1) that the latter involved a domestic corporation, and (2) the tax upheld there was measured by outstanding rather than authorized capital. And these two points of difference alone enable a reconciliation between the *Botkin Case,* where a maximum limit existed, and *Cudahy Packing Co.* v. *Hinkle, supra.*

Writers in law reviews, commenting on the foregoing

Supreme Court decisions, entirely concur in the views which we have expressed above.[15]

In view of the foregoing, it is readily apparent that there is nothing whatsoever in *St. Louis-Southwestern Railway Co.* v. *Arkansas, supra, Kansas City, etc., Co.* v. *Botkin, supra,* or *Kansas City, Memphis & Birmingham R. Co.* v. *Stiles, supra,* which *today* justifies or in any way supports a reaffirmation of the "border line" decision of *General Railway Signal Co.* v. *Virginia, supra.*

[15] See the following case notes and comments: 76 University of Pennsylvania Law Review, 967, and notes; 26 Michigan Law Review, 190; 43 Harvard Law Review, 104, 107; and 29 Columbia Law Review, 834.

II

The Virginia Fee is Invalid Despite the Fact that It Was Imposed at the Time of Entrance.

(1) Position of the Court Below

The Supreme Court of Appeals of Virginia, in the decision which is the subject of this appeal, frankly recognized that the Washington "filing fee" held unconstitutional in the *Cudahy Packing Company Case* was "in principle quite like Virginia's entrance fee." However, the Virginia Court sought to avoid the force and effect of that decision by drawing a distinction between an imposition imposed upon a foreign corporation at the time of entrance into the State, and one imposed thereafter upon an increase in its authorized capital stock, even though both impositions be imposed for the same privilege.[16] The Virginia Court said:

> "An entrance fee is to be distinguished from charges thereafter made." [17]

Thus the decision which Appellant is asking this Court to reverse holds that a fee for the privilege of doing a

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[16] The Attorney General of Virginia, in the brief filed in this case before the Supreme Court of Appeals of Virginia, took substantially the same view. He recognized that *Cudahy Packing Co.* v. *Hinkle, supra,* was controlling unless the State had a greater power to tax at the time of entrance than it did thereafter, even though in each instance the privilege taxed was the right to do a local business.

[17] This basis for sustaining Section 207, it will be noted, is entirely different from that relied on by the Virginia Supreme Court of Appeals and by this Court in sustaining this same statute in the *General Railway Signal Company Case.* In that case, as has been pointed out, the presence of a maximum limit, plus the fact that the fee did not vary in direct proportion to the capital stock, was said to save its validity. The since repudiated *Baltic Mining Company Case,* which had established this "maximum limit doctrine," was the authority followed.

local business may be measured by the total authorized capital stock of the foreign corporation if imposed at the time of entrance, but may not be so measured at any time thereafter.[17(a)]

(2) The Position of the Court Below Ignores the Doctrine of Unconstitutional Conditions

This position by the Court below is a unique reversion to an early misconception of the decisions in *Bank of Augusta* v. *Earle,* 13 Peter 519, and *Paul* v. *Virginia,* 8 Wall. 168. Although paying some slight lip-service to the doctrine of unconstitutional conditions at one place in its opinion, *the Virginia Court has actually applied the now wholly repudiated view that the power to exclude a foreign corporation includes the power to impose any kind or character of condition upon its entrance.*

It is respectfully submitted that in so holding that a fee is valid if imposed at the time of entrance and that the same fee is invalid if imposed thereafter, the Virginia Court of Appeals has not only done violence to the doctrine of unconstitutional conditions, but also has thereby ignored the controlling decisions of this Court establishing that a condition may not be imposed upon entrance which would be invalid if imposed thereafter.

In *Southern Pacific Co.* v. *Denton,* 146 U. S. 202, there was under consideration a Texas statute requiring a foreign corporation desiring to do business in the State to agree as a condition thereto that upon and after admission it would not remove any suit from a State court

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17(a) *People* v. *Loughman,* 249 N. Y. 369, (1928), is the only authority relied upon by the Virginia Court below in support of the unprecedented distinction it sought to apply. This New York case is not in point, as is readily seen upon an examination of the full opinion, and the statute involved. For an analysis of the New York statute, see Appendix, *infra* this Brief, pages 76-79.

to a Federal court. In holding such statute unconstitutional, the Supreme Court said:

> "But that statute, requiring the corporation, *as a condition precedent* to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions." (Italics supplied.)

This same doctrine was reaffirmed in the later case of *Terral* v. *Burke Construction Co.*, 257 U. S. 529 (1922), where a State statute had required foreign corporations to waive their right to use the Federal courts as a condition precedent to procuring a license to enter to do business. In holding that such statute imposed an unconstitutional condition, Mr. Chief Justice Taft said:

> "The principle established by the more recent decisions of this court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, *exact from it a waiver of the exercise of its constitutional right to resort to the Federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does; whether state or interstate, although that has been suggested as a distinction in some cases.*" (Italics supplied.)

Perhaps the most thorough judicial analysis and discussion of a State's power to impose conditions precedent upon foreign corporations at the time of entrance is found in Mr. Justice Sutherland's opinion in the more recent case of *Frost Trucking Co.* v. *Railroad Commis-*

sion, 271 U. S. 583 (1925). The question actually involved there was whether a State, in the exercise of its admitted power to exclude the Trucking Corporation from the highways altogether, could attach, as a condition precedent to the granting of permission to use the highways, the responsibilities and duties of a common carrier. As will be seen from the following excerpts from the opinion, the cases involving the power of a State over the admission of foreign corporations were relied upon as the controlling authorities. The most pertinent part of Mr. Justice Sutherland's opinion follow:

> "The naked question which we have to determine, therefore, is whether the state may bring about the same result by imposing the unconstitutional requirement *as a condition precedent* to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to withhold if it sees fit to do so. Upon the answer to this question the constitutionality of the statute now under review will depend.
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> "There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the state possesses; and the other —the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the state does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made?
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> * * * * *
>
> *"It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such*

conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

"The prior decisions of this court amply justify this conclusion. In *Paul* v. *Virginia,* 8 Wall. 168, 181, the rule was stated to be that the state, having the power to exclude foreign corporations from its limits may admit them upon such terms and conditions as the state may think proper to impose. But in *Insurance Company* v. *Morse,* 20 Wall. 445, 456, it was said that this sweeping language must be understood with reference to the facts of that case; and that it could not be extended to include conditions repugnant to the Constitution and laws of the United States. In *Barron* v. *Burnside,* 121 U. S. 186, 197, this limitation was expressly reaffirmed.

* * * * *

" 'Though a state may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so.'

* * * * *

" '*For, conceding the right of a state to exclude foreign corporations, we must not overlook the limitation upon that right, now equally well settled in the jurisprudence of this court, that the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution.* If this were otherwise, the

state would be permitted to destroy a right created and protected by the Federal Constitution under the guise of exercising a privilege belonging to the state, and, as we have pointed out, the state might thus deprive every corporation of the right to do business within its borders, except upon the condition that it strip itself of the protection given it by the Federal Constitution. * * *

" '* * * While we concede the right of a state to exclude foreign corporations from doing business within its borders for reasons not destructive of Federal rights, we deny that the right can be made to depend upon the surrender of the protection of the Federal Constitution.' " (Italics supplied.)

After outlining the facts in *Western Union Telegraph Co.* v. *Kansas, supra,* Mr. Justice Sutherland then quoted the following:

" 'The right of the Telegraph Company to continue the transaction of local business in Kansas could not be made to depend upon its submission to a condition prescribed by that state, which was hostile both to the letter and spirit of the Constitution. *The company was not bound under, any circumstances, to surrender its constitutional exemption from state taxation, direct or indirect, in respect of its interstate business and its property outside of the State, any more than it would have been bound to surrender any other right secured by the National Constitution.*'

"Since that decision, the same principle has been reiterated many times and never departed from. *Pullman Co.* v. *Kansas,* 216 U. S. 56, 63; *International Textbook Co.* v. *Pigg,* 217 U. S. 91; *Herndon* v. *Chicago, Rock Island & Pacific Ry.,* 218 U. S. 135, 158; *Harrison* v. *St. L. & San Francisco*

R. R., 232 U. S. 318, 332; *Looney* v. *Crane Co.*, 245 U. S. 178, 187; *International Paper Co.* v. *Massachusetts*, 246 U. S. 135, 142-143; *Western Union Tel. Co.* v. *Foster*, 247 U. S. 105, 114; *Public Utility Commrs.* v. *Ynchausti & Co.*, 251 U. S. 401, 404; *Terrall* v. *Burke Constr. Co., supra; Burnes Nat'l Bank* v. *Duncan*, 265 U. S. 17, 24; *Fidelity and Deposit Co. of Maryland* v. *Tafoya et al.*, 270 U. S. 426.

"And the principle, that a state is without power to impose an unconstitutional requirement as a condition for granting a privilege, is broader than the applications thus far made of it." (Italics supplied.)

It will be observed that Mr. Justice Sutherland, following earlier Supreme Court decisions, made no distinction whatsoever between the right of a State to impose conditions precedent at the time of entrance and the State's right to impose conditions precedent to the continuation of business after entrance.[18] *And it will also be noted that, in prescribing the rights which a corporation could not be required to surrender, he expressly referred to a corporation's "constitutional exemption from State taxation, direct or indirect, in respect of its interstate business and its property outside of the State."*

Thus, the foregoing decisions of this court, as they involve conditions imposed at the time of entrance which the corporation was under no compulsion to accept, squarely meet the position taken by the Court below and

[18] This Court has repeatedly held that a State does not relinquish its power to exclude, or impose constitutional conditions upon, foreign corporations merely because they have been once admitted to the State. In *National Council U. A. M.* v. *State Council*, 203 U. S. 151 (1906) it was held "that the power of the State as to foreign corporations does not depend upon their being outside of its jurisdiction."

demonstrate its fallaciousness. Applying the doctrine announced in these cases to the facts of this case, it is manifest that Virginia has no more right to measure its entrance fee by property used in interstate commerce, and by property located in other jurisdictions, than it would have to so measure a fee collected after entrance for the privilege of remaining to do a local business.

Appellant's capital stock represents its business, intrastate and interstate, in 47 States and several foreign countries; and it also represents Appellant's property located in these States and countries.[19] Regardless of *when* the tax is imposed, such capital stock cannot be made the basis of a State imposition.

(3) The Opinion Below is Contrary to the Rule Announced by the Restatement of the Law

Particular attention is called to the fact that the authoritative *Restatement of the Law of Conflict of Laws,* (adopted and promulgated May 11th, 1934, as the final draft), by the American Law Institute, announces unequivocally that a State may not impose conditions upon a corporation at the time of entrance which it could not impose thereafter:

> "A state of the United States cannot compel a foreign corporation, as a condition of doing or continuing to do business in the state, to relinquish rights secured by the Constitution of the United States (Section 170).
>
> * * * * *
>
> "Under the Constitution of the United States, a state cannot make a condition of a foreign cor-

[19] *Western Union Telegraph Co.* v. *Kansas, supra,* at page 30; *International Paper Co.* v. *Mass., supra,* at page 142.

> poration's doing business in the state the payment of a tax which it could not constitutionally impose if the corporation had already been permitted to do business in the state." (Section 176.)

The foregoing excerpts from the Restatement purport to state the existing rule of law. In the "comment" appended to the statement of the rule, it is said:

> "The tax stated in this section may be invalid, for instance, because of its effect on interstate commerce, or because it regulates the amount of the tax by the value of land or chattels outside of the state, or for other reasons."

(4) The Decisions of This Court Involving Fees Measured by Authorized Capital Stock Refute Position of Court Below.

The validity of fees imposed upon foreign corporations for the privilege of doing a local business, and which have been measured by authorized capital stock, has been passed upon by this Court a number of times.[20] Several times the fees involved have been *annual* charges for the privilege of doing a local business; on other occasions the fees considered have been single entrance or

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[20] The most important decisions of this character have been: *Western Union Telegraph Co.* v. *Kansas, supra; Pullman Co.* v. *Kansas, supra; Ludwig* v. *Western Union Telegraph Co., supra; Baltic Mining Co.* v. *Massachusetts, supra; Looney* v. *Crane Co., supra; International Paper Co.* v. *Massachusetts, supra; Locomobile Co.* v. *Massachusetts, supra; Cheney Bros. Co.* v. *Massachusetts, supra; General Railway Signal Co.* v. *Virginia, supra; Air-Way Electric Appliance Corporation* v. *Day, supra;* and *Cudahy Packing Co.* v. *Hinkle, supra.*

filing fees imposed for the same privilege. In only one instance has it happened that the fee was imposed at the time of entrance rather than at a time thereafter.[21] However, in *all* of the cases involving the validity of such fees, this Court has sought to apply the same principles regardless of the time when the fee was collected, and regardless of whether it was an annual or a single fee. Or, stated conversely, this Court has never attributed significance to the *time when* the fee was collected. It has in every case simply sought to ascertain whether the imposition in effect reached property beyond the taxing jurisdiction of the State, whether it operated to burden interstate commerce, and whether it denied equal protection of the laws.

For example, the single filing fee held invalid in the *Cudahy Packing Company Case* happened to have been imposed when the company sought to increase its authorized capital after having come into the State. This fee was not held invalid because the Packing Company was already engaged in business in the State of Washington; its invalidity resulted from the attempt by Washington to measure such fee by property located in other jurisdictions, and by property used in interstate commerce.

Manifestly, the Packing Company's property in other jurisdictions and its property used in interstate commerce would have been no less taxed had the fee been imposed at the time the company entered the State rather than thereafter.

The earlier cases involving the validity of authorized capital stock as a measure for the privilege of doing a local business also clearly indicate that the time *when* the

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[21] *General Railway Signal Co.* v. *Virginia, supra.*

fee is imposed is of no significance on the issue whether the charge reaches property beyond the jurisdiction of the taxing State or property used in interstate commerce.[22]

Western Union Telegraph Co. v. *Kansas, supra,* involved a *single* "charter fee," measured by total authorized capital stock, which was imposed upon foreign corporations as a condition precedent to their doing, or continuing to do, any local business in Kansas. No *annual* franchise or license tax was involved. The statute in question had been passed after Western Union Telegraph Company had come into the State and begun its intrastate business, and hence in the case before the Court the single fee had been charged for the privilege of continuing to do a local business in Kansas. In holding that the fee imposed an unconstitutional condition upon the telegraph company, the Court said:

> "Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the telegraph company, as a charter fee, of a given percent *of its authorized capital, representing, as that capital clearly does, all of its business and property, both within and outside of the state, a condition of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the state, but a burden and tax on the company's interstate business and on its property located or used outside of the state.* The express words of the statute leave no doubt as to what is the *basis* on which the fee, specified in the state statute, rests. That fee, plainly, is not based

[22] As to whether the *time when* the fee is charged affects the issue of equal protection of the laws will be considered *infra,*

on such of the company's capital stock as is represented in its local business and property in Kansas. The requirement is a given percent of the company's authorized capital, that is, all its capital, wherever or however employed, whether in the United States or in foreign countries, and whatever may be the extent of its lines in Kansas as compared with its lines outside of that state. What part of the fee exacted is to be attributed to the company's domestic business in Kansas and what part to interstate business, the state has not chosen to ascertain and declare in the statute. It strikes at the company's entire business wherever conducted and its property wherever located, and in terms, makes it a *condition* of the telegraph company's right to transact purely local business in Kansas that it shall contribute for the benefit of the state school fund a given percent of its whole authorized capital, representing all of its property and all of its business and interests everywhere.

* * * * *

"We repeat that the statutory requirement that the telegraph company shall, as a condition of its right to engage in local business in Kansas, first pay into the state school fund a given percent of its authorized capital, representing all its business and property everywhere, is a burden on the company's interstate commerce and its privilege to engage in that commerce, in that it makes both such commerce, as conducted by the company, and its property outside of the state, contribute to the support of the state's schools. *Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a percent of its capital stock a 'fee' for the privilege of doing local business. To hold otherwise is to allow form to control substance."* (Italics supplied.)

It is entirely clear from reading the Kansas statutes, as well as the Court's opinion, by Mr. Justice Harlan, that no distinction was contemplated between the imposing of such a fee upon a corporation which happened to have begun business before the enactment of the law and the imposing of the same fee upon a corporation which desired to come in subsequent to such enactment.

The right to exclude foreign corporations, so emphasized by the opinion below, is not and never has been limited to foreign corporations which are "outside" the State at the time the State undertakes to exercise this right. This has been decided many times but for a case particularly involving Virginia, reference may be made to *National Council U. A. M.* v. *State Council,* 203 U. S. 151 (1906), (affirming 104 Va. 197), where the Supreme Court, in speaking of the power of the Virginia Legislature with respect to a foreign corporation already *within the State,* unequivocally said:

> "The State of Virginia had the undoubted right to exclude the Pennsylvania corporation and to forbid its constituting branches within the Virginia boundaries. *As it had that right before the corporation got in, so it had the right to turn it out after it got in.*
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> * * * * *
>
> "* * * *the power of the State as to foreign corporations does not depend upon their being outside of its jurisdiction.*" (Italics supplied.)

Manifestly, therefore, the fact that Western Union Telegraph Company was already doing a local business in Kansas, was of no significance. There is language in the concurring opinion in the *Western Union Company Case* by Mr. Justice White which gives importance to

the fact that the telegraph company was doing an interstate business both in and out of Kansas at the time the charter fee was imposed. Although later decisions do not follow Mr. Justice White's views, it should be noted here that Appellant, like Western Union Telegraph Company, had for many years prior to the imposition of the fee presently involved, been actively engaged in interstate commerce in forty-seven States, *including Virginia,* and in numerous foreign countries.

Pullman Co. v. *Kansas, supra,* and *Ludwig* v. *Western Union Telegraph Co., supra,* are two additional Supreme Court decisions which hold invalid *single* fees measured by authorized capital stock, and imposed upon foreign corporations as a condition to the doing, or continuing to do, of an intrastate business. The facts in both of these cases were quite similar to those in *Western Union Telegraph Co.* v. *Kansas, supra,* and need not be reviewed here. No distinction was made in either of them between single entrance fees and charges imposed thereafter for the privilege of doing a local business.

In *International Paper Co.* v. *Massachusetts, supra,* the Supreme Court summarized certain general principles applicable to cases of this kind, which summary is frequently cited. A careful reading thereof demonstrates that no distinction was made between fees imposed at the time of entrance and those imposed thereafter:

> "A license fee or excise of a given per cent of the entire authorized capital of a foreign corporation doing both a local and interstate business in several states, *although declared by the state imposing it to be merely a charge for the privilege of conducting a local business therein,* is essentially and for every

practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other states; and this because the capital stock of the corporation represents all its business of every class and all its property wherever located.

When tested, as it must be, by its substance—its essential and practical operation—rather than its form or local characterization, such a license fee or excise is unconstitutional and void as illegally burdening interstate commerce and also as wanting in due process because laying a tax on property beyond the jurisdiction of the state." (Italics supplied.)

Finally, no such distinction as the court below has undertaken to draw was made either by this Court or by the Virginia Court in deciding the *General Railway Signal Company Case* in 1918. In short, this alleged distinction, based upon the time when a fee is imposed, is now urged for the first time in an effort to avoid the otherwise controlling effect of the recent decision in *Cudahy Packing Co.* v. *Hinkle, supra.*

(5) Decisions of State Courts Also Refute Position of Court Below.

There have been a number of recent decisions by the highest courts in other States which squarely support Appellant's position, and which therefore refute the position taken by the Virginia Court below as to the existence of a controlling distinction between fees imposed at the time of entrance and those imposed thereafter.

These State court decisions were presented to the court

below, but apparently were ignored.[23] While of course in no way binding upon this Court, these decisions from California, Missouri, Montana, South Carolina, Utah, and Wisconsin, which have all been rendered recently, reflect the views of many able and impartial judges as to the constitutionality of authorized capital stock as a measure for a privilege tax on foreign corporations under circumstances substantially similar to those presently involved. These judges, with the *Railway Signal Company Case* and the other adjudications of this Court before them, have undertaken to determine and apply the law as they found it reflected in the decisions of the Supreme Court of the United States. Certainly their studied judgments in cases incapable of sound distinction from that presently before this Court, are entitled to great weight.

Moreover, if the decision of the Court below is permitted to stand, the authority of each of these other State decisions will be open to fresh attack. Once again the law on this subject will be thrown into a confused state such as that produced for a time by the Baltic Mining Company decision.[24]

For these reasons, and perhaps at the risk of tediously

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[23] Apparently referring to these decisions by other State Courts, the Court below said: "We have not undertaken to review the cloud of cases brought to our attention. 'They beat down the mind and cloud with dust the vision.'" *The Atlantic Refining Co.* v. *Commonwealth*, 165 Va. 492, at p. 504.

[24] A careful search has failed to disclose a single State authority which supports the decision below. It is believed that such decision by the Virginia Court stands alone as the only case decided since 1918, and not subsequently overruled or reversed, which sustained a charge upon a foreign corporation measured solely by total authorized capital stock, where such corporation had property situated in other jurisdictions, and was also engaged in interstate commerce.

prolonging this brief, we now submit a review of several of these State decisions.

Perhaps the leading such case is *Perkins Manufacturing Co.* v. *Jordan,* 200 Calif. 667 (1927) decided by the Supreme Court of California. The statute there involved required foreign corporations upon entering to do a local business, and annually thereafter, to pay a fee measured on a graduated basis by authorized capital. *The fee so imposed did not vary in direct proportion to authorized capital stock, and there was a maximum limit of $1,000 where the authorized capital was $10,000,000 or more.* Perkins Manufacturing Company, *a foreign corporation not theretofore engaged in business in California,* sought to procure a certificate of authority to do a local business but declined to pay the license fee demanded by the State. The State refused a certificate and mandamus proceedings were instituted. The California court's summary of the characteristics of the fee involved may well have been written concerning Section 207 of the Virginia Tax Code. The characterization fits perfectly:

> "It will be noted that this fee is in nowise regulated by either the amount of property owned, capital employed or business done within the state. Indeed, it bears no relation whatever to the property owned, capital employed, or business volume of the corporation either in or out of the state or at all. The tax is predicated solely upon the authorized capital stock of the corporation and is wholly without relation to any other standard. Again, the corporation thus taxed may never issue the amount of stock authorized and, if it does, it may employ the whole thereof in its business elsewhere than in California. A corporation with a small amount of

authorized capital stock may be doing an immense business in California and be required to pay only a small privilege tax, whereas, on the other hand, a corporation with a large authorized capital stock may be doing an insignificant amount of business in California and under this act be required to pay a larger privilege tax."

In addressing itself to the argument that a fee charged upon admission is different from a fee collected thereafter, the Court soundly said:

> *"There is no substance in the argument of respondent that a different principle may apply in the case of filing fees graded on authorized capital than in the case of a privilege or excise tax based upon authorized capital. The effect upon interstate commerce and upon equal protection of the law to persons in the several states is the test, and neither the name nor the aim of the state tax can suffice to prevent consideration by the Supreme Court of the United States of the necessary effect and consequences of the state statute."* (Italics supplied.)

It is also of interest to note that in the foregoing case, the California Supreme Court overthrew its prior decision of *Pick & Co.* v. *Jordan,* 169 Calif. 1, 145 Pac. 506, (1916), which decision had followed *Baltic Mining Co.* v. *Massachusetts, supra.* In the *Perkins Manufacturing Company Case,* the court also reviews at length the course of the decisions by this Court on this question, and concludes with prophetic insight (before *Cudahy Packing Co.* v. *Hinckle* was decided) that *International Paper Co.* v. *Massachusetts, supra; Alpha Portland Cement Co.* v. *Massachusetts, supra,* and *Air-Way Electric Appliance Corp.* v. *Day, supra,* had in effect overruled the *Baltic*

Case and "realigned" the Supreme Court in accord with *Western Union Telegraph Co.* v. *Kansas, supra.* The California court said:

> "These decisions re-align the court in accord with such previous decisions as *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1 (54 L. Ed. 355, Sup. Ct. Rep. 190), *Pullman Co.* v. *Kansas*, 216 U. S. 56 (54 L. Ed. 378, 30 Sup. Ct. Rep. 232), *Ludwig* v. *Western Union Tel. Co.*, 216 U. S. 146 (54 L. Ed. 423, 30 Sup. Ct. Rep. 280), *Atchison, etc. Ry. Co.* v. *O'Connor*, 223 U. S. 280 (Ann. Cas. 1913C, 1050, 56 L. Ed. 436, 32 Sup. Ct. Rep. 216), *International Textbook Co.* v. *Pigg*, 217 U. S. 91 (18 Ann. Cas. 1103, 27 L. R. A. (N. S.) 493, 54 L. Ed. 678, 30 Sup. Ct. Rep. 481), *Buck Stove & Range Co.* v. *Vickers*, 226 U. S. 205 (57 L. Ed. 189, 33 Sup. Ct. Rep. 41), and produce harmony between those decisions and the following cases: *Looney* v. *Crane Co.*, 245 U. S. 178 (62 L. Ed. 230, 38 Sup. Ct. Rep. 85), *International Paper Co.* v. *Massachusetts*, 246 U. S. 135 (Ann. Cas. 1918C, 617, 62 L. Ed. 624, 38 Sup. Ct. Rep. 292), *Air-Way, etc. Corp.* v. *Day, supra*, and *Alpha Portland Cement Co.* v. *Massachusetts, supra.*
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> "The so-called *Baltic-Dental Case (Baltic Mining Co. & S. S. White Mfg. Co.)* v. *Commonwealth of Massachusetts*, 231 U. S. 68 (58 L. Ed. 127, 34 Sup. Ct. Rep. 15), has in some respects been distinguished, in other respects definitely overruled. See *Looney* v. *Crane Co., supra*, and *Alpha Portland Cement Co.* v. *Massachusetts, supra.*
>
> "The effect of this re-alignment of the Supreme Court of the United States is to necessarily overthrow our holding in the case of *Pick & Co.* v. *Jordan*, 169 Cal. 1 (Ann. Cas. 1916C, 1237, 145 Pac. 506), and to revive the doctrine announced in

the case of *Mulford* v. *Curry*, 163 Cal. 276, (125 Pac. 236). We accord to the legislature a sincere effort to frame a law that was just so far as the amount of the charges to foreign corporations desiring to enter our state for intrastate business was concerned, and the legislature, no doubt, acted in perfect good faith, relying upon the validity of the decision in the case of *Pick & Co.* v. *Jordan, supra*, but in view of the holding of the United States Supreme Court above announced, that a law on this subject in order to be valid must bear at least some relation to property owned and used and business carried on or proposed to be carried on within the state of California, we must bow to the supremacy of the Federal Constitution in this matter as interpreted by the highest court of our country."

Thus, confronted with the validity of a fee substantially identical to that imposed upon Appellant under Section 207, the Supreme Court of California followed the more recent decisions of this Court and reversed its own earlier decisions which have followed *Baltic Mining Co.* v. *Massachusetts, supra.*

The Supreme Court of Utah, like that of California, has squarely held that the same principles are applicable to a single entrance or filing fee as are applicable to privilege fees imposed thereafter. In *Badger* v. *Crockett*, 70 Utah 265, 259 Pac. 921 (1927), J. C. Penny Company, a Delaware corporation, had "succeeded to all the property and business of a corporation by the same name organized and existing under and by virtue of the laws of the State of Utah," and had thereupon sought to procure a certificate of authority to carry on the local business theretofore carried on by its predecessor. (It will be observed that the J. C. Penny Company did exactly what

the Appellant did here in taking over the business of its subsidiaries in this State.)

Before a certificate of authority could be procured, the foreign corporation was required by the Utah statute to pay an entrance fee of 25c on each $1,000 par value of its authorized capital stock. In fairness, we should say that no maximum appears to have been prescribed, but for the reasons heretofore stated this fact is now wholly without importance. The required fee was paid under protest and suit instituted for its refund. In allowing recovery, and in holding the entrance fee unconstitutional, upon the authority of the Supreme Court decisions[25] above discussed, the Utah Supreme Court said:

> "The right of the state to exact the fee provided for in Section 2511, *supra, as a condition precedent to doing a local business in this state* is challenged as being violative of the commerce clause and the due process provision of the Federal Constitution. The concrete question here, therefore, is whether the state of Utah, under the conceded facts, may legally demand of respondent's assignor as a condition precedent to doing a local business in the state of Utah the tax or fee as specified in Section 2511, *supra.*"
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> * * * * *
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> "The exacting of this tax or fee in its practical operation must of necessity be a burden upon interstate commerce and a tax upon property beyond the jurisdiction of the state, all of which is prohibited by the federal constitution." (Italics supplied.)

[25] It will be recalled, however, that the Utah Court, like the California Court in the *Jordan Case*, was then without the benefit of the clarifying and controlling light shed upon this subject by the *Cudahy Packing Company Case*.

A few months after the decision of *Badger* v. *Crockett, supra,* the Supreme Court of Utah again passed upon the validity of an imposition upon foreign corporations measured by authorized capital stock. In *Minneapolis Steel and Machinery Co.* v. *Crockett,* 71 Utah 211, 263 Pac. 920 (1928), the tax in question was an annual license fee for the privilege of doing a local business, and following its earlier decision, the Utah Court held such fee unconstitutional. The amount of the annual fee appears to have been graduated in a manner similar to the Virginia statute, and with the unusually low maximum of $750.00 for all corporations having an authorized capital stock of over four million dollars. In an effort to avoid the effect of the recent decision in the *Badger Case,* it was argued that the principles there announced applied only to entrance fees and not to annual impositions. The Court promptly disposed of this argument as follows:

> "We can see no difference in principle between the requirements of the statute above quoted, Section 1271 (imposing the annual fee), and the provision of Section 2511 (imposing the entrance fee) involved in the *Badger Case. Both the fee or tax fixed by Section 2511 and the license fee fixed by Section 1271 are measured solely by the authorized capital stock, and neither is in any way related to the capital invested in business within the state or capital invested in the business of the corporation wherever located. The effect or result in either case must be the same, namely, to impose a tax upon a foreign corporation engaged in interstate commerce without regard to the amount of property invested within the state, and likewise to lay a tax upon property beyond the boundaries of the state.* It appears by the allegations of the complaint that

only a small percentage of the capital stock invested in the plaintiff corporation is used or invested in the state of Utah. Like facts appear in the allegations of the causes of action with reference to plaintiff's assignors. Tested by the standard of the opinions of the Supreme Court of the United States, and which opinions controlled our decision in the *Badger Case,* we can see no escape from the conclusion that the judgment in the *Badger Case* must be, and is, controlling of the question involved here.

"The Attorney General relies chiefly on the opinion of the Court in Baltic Min. Co. v. *Massachusetts,* 231 U. S. 68, 34 S. Ct. 15, 58 L. Ed. 127. *The opinion in that case gives support to the defendants' contention, but later decisions emanating from the same Court state that the rule or principle announced in Baltic Min. Co.* v. *Massachusetts must be considered as no longer the rule of law adhered to by that court."*

* * * * *

"The Attorney General, in an effort to differentiate Sections 2511 and 1271, argues that the fee fixed by Section 1271 is a license or excise fee, and is a tax or fee permissible for the state to collect so long as the amount of the fee is not unreasonable; and he further argues that the maximum annual fee of $750 for the privilege of continuing business in the state cannot be held to be unreasonable or arbitrary. The contention is not sound. *It is not the amount of the tax that is objectionable. It is rather the fact that the state by the statute in question imposes a tax or burden upon a foreign corporation which it permits to do business within the state without regard to the property of the corporation within the state or to the amount of money actually invested in the corporation both within and without the state.* In that regard it is a tax imposed upon interstate commerce, and upon property beyond

the jurisdiction of the state, neither of which is within the power of the state to do."

* * * * *

"The Supreme Court of California in *Perkins Mfg. Co.* v. *Jordan* (Cal.) 254 Pac. 551, recently decided, touching a question almost identical with the question here under review, says: 'There is no substance in the argument of respondent that a different principle may apply in the case of filing fees graded on authorized capital than in the case of a privilege or excise tax based upon authorized capital. The effect upon interstate commerce and upon equal protection of the law to persons in the several states is the test, and neither the name nor the aim of the state tax can suffice to prevent consideration by the Supreme Court of the United States of the necessary effect and consequences of the state statute.'

"The foregoing statement of the California Court has, in our judgment, abundant support in the decision of the Supreme Court of the United States. *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, 38 S. Ct. 292, 62 L. Ed. 624, Ann. Cas. 1918C, 617; *Air-Way, etc. Corp.* v. *Day,* 266 U. S. 71, 45 S. Ct. 12, 69 L. Ed. 169; *Alpha Portland Cement Co.* v. *Massachusetts, supra; Frick* v. *Commonwealth of Pennsylvania,* 268 U. S. 473, 45 S. Ct. 603, 69 L. Ed. 1058, 42 A. L. R. 316, and cases cited and discussed in these various opinions." (Italics supplied.)

Thus we have two careful opinions from the highest court in Utah flatly rejecting, in a most convincing fashion, the position taken by the court below that the constitutional principles which apply to entrance fees are different from those applicable to fees collected thereafter. Also, needless to say, these two decisions, as well

as that of the California court in the *Perkins Manufacturing Company Case,* squarely support Appellant's entire contention that the charge imposed under Section 207 is unconstitutional.

Chicago, Etc., Railroad Co. v. *Harman,* 89 Mont. 1, 295 Pac. 762 (1931),[26] is another recent State decision which holds an *"entrance fee"* measured by authorized capital stock invalid, and which also clearly indicates that the same constitutional principles are applicable to all so-called privilege fees imposed upon foreign corporations which are measured by property located beyond the State and used in interstate commerce.

The Supreme Court of South Carolina also has held unconstitutional a statute of that State which sought to impose an *entrance fee* upon foreign corporations measured by authorized capital stock. In *State* v. *Liggett & Myers Tobacco Co.,* 171 S. C. 511, 172 S. E. 857 (1933),[26(a)] the charge involved was an entrance fee sought to be collected from the Tobacco Company for the privilege of doing a local business. In describing the nature of the statute, the Court emphasized that it was essentially a charge upon entrance:

> "While the act refers to foreign corporations entering this State or already engaged in business in this State, *it is reasonable to say that the prime object of the Act was applicable to foreign corporations preparing to engage in business in this State.* Up to the time of engaging in business, such foreign corporation presumably had no property in the State nor was any part of its capital stock used in this

[26] It is to be noted that this Montana case is contrary to the earlier case by the same court of *State ex rel. General Electric Co.* v. *Alderson,* 49 Mont. 29. Such earlier case had followed the *Baltic Mining Company Case.*

[26(a)] Appeal dismissed, 291 U. S. 652.

> State, for the reason that it had not, up to then, engaged in any business in the State." (Italics supplied.)

The South Carolina court declared that the "earlier decisions of the Supreme Court of the United States were somewhat conflicting in their holdings," but held that *Cudahy Packing Co.* v. *Hinckle, supra,* was "very nearly in point," and that the validity of the South Carolina statute was controlled by that decision.

It appeared from the facts that the entrance fee which was held unconstitutional had been enacted in 1922, and that the Tobacco Company had been engaged in business in South Carolina prior to that time. However, it is entirely clear from the opinion that no weight whatsoever was attributed to the presence within the State of the foreign corporation at the time the entrance fee statute was enacted. This decision, like those above discussed, is predicated squarely upon the illegality of authorized capital stock as a measure for any charge imposed upon a foreign corporation for the privilege of doing a local business where such corporation has property in other States, or property used in interstate commerce.[27]

In concluding this discussion of the distinction sought to be drawn by the court below between a fee imposed at the time of entrance and one imposed thereafter, reference may be made to *Fletcher, Cyclopedia on Corporations,* Volume 18, where, in Section 8817, the eminent author summarizes the law as follows:

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[27] For two additional recent State decisions bearing upon this subject, and supporting Appellant's position generally, see: *Montgomery Ward Co.* v. *Becker,* 334 Mo. 789, (certiorari denied, 293 U. S. 559) and *State ex rel. Borden* v. *Dammann,* 198 Wisc. 265.

"The decisions as to the power to impress a tax of a given per cent of the entire authorized capital stock of a foreign corporation, as a condition of doing business in the state, are stated in another section of this subdivision, *and while, in many of the cases, the imposition was a charter fee for admission into the state, the governing law seems to be the same without regard to whether the imposition is an admission fee or a franchise tax collected annually after admission into the state.*" [28] (Italics supplied.)

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[28] To substantially the same effect, see *Colvert & Pyke, Taxation of Foreign Corporations,* 5 Cincinnati Law Review 54, 74-81; and comment in 43 Harvard Law Review 104.

III

The Imposition of This Fee Measured By Authorized Capital Stock Deprived Appellant of the Equal Protection of the Laws.

(1) Statement of Appellant's Position.

In the preceding sections of this brief we have argued the denial of due process resulting from taxing Appellant's property beyond the jurisdiction of Virginia, and the unlawful burdening of interstate commerce resulting from the taxing of Appellant's property used in such commerce.[29] The final assignment of error, namely, the denial of equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution will now be argued. Appellant's position in this regard is that authorized capital stock is an inherently arbitrary and discriminatory measure for a privilege tax imposed on *foreign* corporations.

The contention that Section 207 offended the equal protection clause was not expressly discussed by the opinion below. However, in affirming the judgment of the State Corporation Commission, the Virginia court necessarily ruled upon this question adversely to Appellant.[30]

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[29] Such argument has been in support of Appellant's second and third specification of errors, *supra*.

[30] In criticizing the opinion by the Virginia Court in this case, the Virginia Law Review, after expressing the view that Section 207 was "an interference with interstate commerce" and "a denial of due process," further said: "It would seem that a holding that the statute (Section 207) denied equal protection of the laws to foreign corporations would have been justified." 22 Va. Law Review 958, at page 960.

(2) The Leading Case of Air-Way Electric Appliance Corp. v. Day.

In *Air-Way Electric Appliance Corp.* v. *Day*,[31] *supra*, this Court decided for the first time that the imposition of a privilege fee upon *foreign* corporations for the privilege of doing a local business is invalid as a denial of equal protection of the laws where such fee is measured by authorized capital. After first holding that the fees burdened interstate commerce, and in effect taxed property beyond the State, Mr. Justice Butler further held:

> "The number of shares not subscribed or issued has no relation to the privilege held by plaintiff in Ohio, and it is not a reasonable measure of such a fee. Such shares may never be subscribed or issued or additional shares may be issued to acquire property or do business in other states or to carry on interstate commerce. Plainly the fee, to the extent that it is based on a number of shares in excess of those outstanding, has no relation to what was paid in for the stock or to its value or to the amount of plaintiff's capital, its property or its business, intrastate in Ohio or interstate. *The act in its practical operation does not require like fees for equal privileges held by foreign corporations in Ohio under the same circumstances. Unless, under the laws of the states where organized they chance to be authorized to issue the same number of non-par value shares, the annual franchise fees imposed on foreign corporations having the same amount of*

[31] This case was decided in 1924, six years after the decision in *General Railway Signal Co.* v. *Virginia, supra.* It must be remembered, also, that the question of the denial of equal protection of laws, like that of due process, was not involved in the *General Railway Signal Company Case.* In that case the only question raised or considered was whether interstate commerce was burdened.

property and business, and exercising the same privileges in Ohio will not be the same; and the charge imposed on one may be many times that made against another.

* * * * *

"It is clear that the *mere number of authorized non-par value* shares is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of such annual fees. Such a classification is not based on anything having relation to the purpose for which it is made." [32] (Italics supplied.)

In view of this Court's opinion in the *Air-Way Electric Appliance Corporation Case,* it is manifest that Appellant should be accorded the relief here sought if Appellant was entitled to be accorded equal protection by the laws of Virginia at the time the fee in question was imposed. The fee involved in the *Air-Way Corporation Case* was assessed after the corporation had been admitted to do a local business rather than at the time of entrance as in the case now before this Court. This difference in the time *when* the fee was imposed alone prevents *Air-Way Electric Appliance Corp.* v. *Day* from being a square precedent. Even so, Appellant submits for reasons which will now be developed that the rule of that case is applicable and controlling.

At the outset of this argument Appellant, of course,

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[32] A number of State courts have followed the *Air-Way Electric Appliance Corporation Case,* and held authorized capital stock to be an inherently invalid measurement for a privilege tax upon foreign corporations. For examples of such decisions, see *Perkins Mfg. Co.* v. *Jordan, supra; Montgomery Ward & Co.* v. *Becker, supra; Great Northern Rwy. Co.* v. *State,* 147 Wash. 630; and *State ex rel Borden Co.* v. *Dammann, supra.* Cf. *Roberts & Schaffer Co.* v. *Emmerson,* 271 U. S. 50.

recognizes that a State may legislate differently as between domestic corporations and foreign corporations prior to such time as the latter are admitted to the State. *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494 (1926). Appellant also recognizes, as being settled law, that foreign corporations are entitled to equal protection with domestic corporations once the former are admitted to the State. *Southern Railway Co.* v. *Greene*, 216 U. S. 400 (1910); *Kentucky Finance Corp.* v. *Paramount Auto Exchange Corp.*, 262 U. S. 544 (1922). Moreover, *Air-Way Electric Appliance Corp.* v. *Day*, *supra*, holds that all foreign corporations admitted to do business in a State are entitled to equal protection.

The question thus left open by all of these decisions is whether foreign corporations must be accorded equal protection of the laws with respect to the conditions imposed upon them at the time of entrance.[33]

(3) The Doctrine of Unconstitutional Conditions Protects Foreign Corporations Seeking Entrance from Arbitrary and Discriminatory Conditions.

It is submitted that the answer to this question left open by the decisions of this Court is supplied by the doctrine of unconstitutional conditions, as that doctrine has been developed by judicial decisions. While the State may still exclude foreign corporations entirely, it is now well settled that once entrance is permitted the State may not impose as a condition thereto any unconstitutional requirement.[34] In *Williams* v. *Standard Oil*

[33] Apparently this Court has never heretofore passed upon this question.

[34] For numerous examples of the application of this doctrine, see the authorities cited *supra* under Section II (2) of this brief.

Co. of Louisiana, 278 U. S. 235 (1929), the modern rule is succinctly stated:

> "Nor need we stop to consider the further contention that appellees, being foreign corporations, may not carry on their business within the state except by complying with the conditions prescribed by the state. While that is the general rule, a well settled limitation upon it is that the state may not impose conditions which require the relinquishment of rights guaranteed by the Federal Constitution."

A discriminatory admission fee, imposed as a condition upon the entering to do a local business, comes within the logical scope of the doctrine of unconstitutional conditions. When an admission fee is imposed the State has elected not to exclude the foreign corporation. The moment this election is made, "conditions which require the relinquishment of rights guaranteed by the Federal Constitution" cannot be imposed. One of the rights so guaranteed is equal protection of the laws, and this right is clearly infringed if a discriminatory charge is exacted at the time of entering to do a local business.

The fact that the foreign corporation may avoid the unconstitutional condition by staying out of the State has been held repeatedly not to render such condition constitutional, See *Power Manufacturing Co.* v. *Saunders,* 274 U. S. 490 (1927).

Counsel for Appellee contend that even if the doctrine of unconstitutional conditions prevents a State from exacting an entrance fee which reaches property in other jurisdictions, or which burdens property used in interstate commerce, such doctrine can have no application to the equal protection clause. This argument is based on the language of the Fourteenth Amendment, which

in terms requires a State to accord equal protection to persons "within its jurisdiction."[35] Appellee asserts, therefore, that no corporation seeking the privilege of admittance to do a local business is within the State's jurisdiction, and that accordingly the entrance fees and conditions may be as discriminatory, between foreign corporations seeking admission, as the State may desire to make them.

This argument has the dubious virtue of surface plausibility. It is similar in principle, as well as plausibility, to the now repudiated argument that since a State has the power to exclude foreign corporations, it may impose any condition desired as the price of admission.

The fallacy of Appellee's argument is perhaps nowhere more concisely exposed than in this Court's opinion in *Frost Trucking Co.* v. *Railroad Commission, supra,* where it was said:

> " 'For, conceding the right of a state to exclude foreign corporations, we must not overlook the limitation upon that right, now equally well settled in the jurisprudence of this court, that the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution. *If this were otherwise, the state would be permitted to destroy a right created and protected by the Federal Constitution under the guise of exercising a privilege belonging to the state, and, as we have pointed out, the state might thus deprive every corporation of the right to do business within its borders, except upon the condition that it strip itself of the protection given it by the Federal Constitution.* * * *' " (Italics supplied.)

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[35] No such limitation exists with respect to the denial of due process, and the burdening of interstate commerce.

A corporation must be regarded as being within the jurisdiction of the State once the right to exclude entirely is waived. Virginia has adopted a general law applicable to all foreign corporations desiring to do business here; by so doing and until such law is repealed, all corporations may come into the State by paying the entrance fee and conforming to certain other formal requirements. *The fee is paid under Virginia law. Can the State by its laws exact a fee and at the same time say that the corporation paying such fee is not within its jurisdiction so far as that fee is concerned?*

Furthermore, if Appellee is correct in contending that a State may deal as arbitrarily and discriminatorily as it may desire with foreign corporations seeking identically the same privilege, namely, the right to enter to do a local business, a way has been discovered to thwart and dissipate much of the protection now afforded foreign corporations by the doctrine of unconstitutional conditions.

If Appellee's position is sustained, a State may with complete legal impunity impose grossly discriminatory fees at the time of entrance and avoid constitutional difficulties unless other provisions of the Constitution are violated. That is, an entrance fee may be grossly discriminatory, and yet at the same time it may not be measured by property used in interstate commerce, or located beyond the taxing jurisdiction of the State.[35(a)] For example, the amount of the fee charged at the time of entrance might arbitrarily be fixed at $100,000 for oil company A, at $50,000 for oil company B, at $5,000 for oil company C and so on. In order to avoid discouraging oil company B too greatly by such a

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[35(a)] In the instant case, Section 207 is not only grossly discriminatory, but also it violates two additional constitutional mandates.

large entrance fee, the State may further provide that such fee, although charged at the time of and as a condition upon entrance may be payable in small annual installments. While the foregoing example may seem remotely possible, we believe it illustrates the unsoundness of a distinction based solely upon *when* the fee for the privilege of doing business is charged. If charged after entrance and measured by authorized capital stock, it is discriminatory and invalid;[36] if charged at the time of entrance and measured by authorized capital stock it is admittedly no less discriminatory. How can it be less invalid?

Recognizing the dangers indicated above, a leading writer on the subject of unconstitutional conditions pointed out, as early as 1918, that such doctrine would be extended to afford corporations seeking admission the equal protection of the laws. Henderson, in his volume "The Position of Foreign Corporations in American Constitutional Law," at page 161, makes this prophecy in connection with the case of *Southern Railway Co.* v. *Greene, supra.* In speaking of certain language used in that case which indicated that permanent investment within the State was necessary before a foreign corporation was entitled to equal protection, he said:

> "If this view prevails, the doctrine of the State's power to exclude foreign corporations has still much vitality left. *It will protect corporations which have unlimited licenses against additional exactions, but it will not prevent states from carrying out a policy of aggressive discrimination against corporations seeking admission. As to them, the state can not only impose discriminating conditions at the outset, but it can grant them licenses running for a year,*

[36] *Air-Way Electric Appliance Corp.* v. *Day, supra.*

and require an annual renewal. Each renewal can then be made conditional on whatever further exactions the state wishes to make. And if from year to year, why not for a shorter period, or even at will? The effect of the *Greene Case* would then be similar to that of the famous *Dartmouth College Case,* and could be as easily avoided by a general reservation of the right to amend. This points, it seems to me, to the fallacy underlying any such restriction of the doctrine of the *Greene Case,* for a license terminable at will is precisely what the traditional doctrine has always called the corporation's tenure. If a corporation can give an effective consent to the state's express statutory reservation of the right to alter the conditions on which it may remain, why could it not as effectively consent to what the Supreme Court had always said was the state's right without such reservation? *To limit the doctrine of the Greene Case to corporations already lawfully in the state by official license is to conclusively refute the reasoning on which that case rests.*

"Is it not just here that the doctrine of unconstitutional conditions applies? That doctrine, in its later form, is that a state cannot, in the guise of a conditional license to do business in the state, exact of a foreign corporation anything which it could not exact by direct imposition. It cannot admit a corporation on condition that it will allow itself to be deprived of property without due process, or to be denied the equal protection of the laws."

* * * * *

"It seems most likely, therefore, that the doctrine of unconstitutional conditions will in the future be absorbed in the larger principle that a foreign corporation is protected against arbitrary expulsion or discrimination by the Fourteenth Amendment, and that its only influence will be to insure that that doctrine is applied not only to corporations already

> in the state when the objectionable law was passed, but to all that may subsequently enter." (Italics supplied.)

The language in the *Greene Case* indicating the necessity of investment within the State has, as Henderson prophesied, been disregarded. The equal protection clause was applied where the corporation entered the State solely for the purpose of bringing suit, *Kentucky* v. *Paramount Exchange, supra,* and where the only property in the State was good will. *Hanover Fire Insurance Co.* v. *Harding, supra.* See also 42 *Harvard Law Review,* 676, 678.

A recent article appearing in 5 *Cincinnati Law Review* 54, entitled "Taxation of Foreign Corporations," written by Messrs. Ralph A. Colvert and John S. Pyke, discussed in considerable detail the question of the applicability of the equal protection clause to fees imposed at the time of entrance. Since there appear to be no controlling judicial precedents on this problem, we take the liberty of quoting from this article (pp. 75-81):

> "The answer to this problem may in some measure be determined by an examination of the attitude of the Supreme Court toward 'unconstitutional conditions' imposed by a state on the admission of foreign corporations.
>
> "Although early in the history of corporate law, such unconstitutional conditions were within the power of the states, in the last twenty years the Supreme Court has refused sanction of burdens on the foreign corporation repugnant to the Federal Constitution. No longer, for instance, can a state require a foreign corporation, before it may do business in the state, to consent to waive all rights

to appeal cases to Federal courts, nor are states allowed to impose regulations which would burden interstate commerce.

"Although we have no settled law on the question, the doctrine naturally extends itself to a refusal to allow states to deny foreign corporations equal protection of the laws. The problem has two phases: first, discrimination between a domestic and a foreign corporation; and second, discrimination between two different foreign corporations.

"It readily appears that a state may levy an admission fee which would subject foreign corporations to a burden from which domestic corporations would be free, for otherwise we would be forced to abandon entirely the use of admission fees. (Citing *Hanover Fire Ins. Co.* v. *Harding.*)

* * * * *

"Although this first phase of the 'equal protection' problem is clear, the second question of the constitutionality of admission fees which discriminate between two foreign corporations is more puzzling. The Supreme Court, which no clear pronouncements on the issue, is indecisive; the trend of judicial interpretation, however, points in only one direction." (Italics supplied.)

After citing *Henderson, op. cit. supra,* the Restatement of the Law of Conflict of Laws, and after referring to several persuasive judicial decisions, these writers in the Cincinnati Law Review conclude that "an admission fee based on authorized capital stock would be declared unconstitutional" as a denial of equal protection of the laws. In so concluding, they added:

"We have observed that, although as a condition to doing business a state may discriminate between

domestic and foreign corporations, it may not demand foreign corporations to waive the right of appeal to Federal courts, or to submit to burdensome regulation of interstate commerce, or to forego protection of the laws equal to that accorded to other foreign corporations. *Despite the fact that the Supreme Court has not yet squarely ruled on this question, it seems that in the light of recent authorities and the attitude of the Supreme Court in curbing the arbitrary power of a state to exclude foreign corporations, the same principles will control in both annual and admission fees. Consequently, it would seem that an admission fee based on the proportion of authorized capital stock represented in the state, would be declared unconstitutional as a denial of equal protection of the laws.*" (Italics supplied.)

Apparently, the only judicial decision wherein this particular question has been squarely passed upon is the California case of *Perkins Manufacturing Co.* v. *Jordan, supra.* As heretofore pointed out, the facts in that case were substantially identical to those presently involved, particularly since the corporation involved was seeking to enter the State for the first time. Although relying upon other grounds of unconstitutionality, the California court also held that the fee in question violated the equal protection clause of the Constitution. In so holding, the court squarely met the argument that a fee charged upon admission is entitled to different treatment from a fee collected thereafter. The court said:

"There is no substance in the argument of respondent that a different principle may apply in the case of filing fees graded on authorized capital than in the case of a privilege or excise tax based upon authorized capital. The effect upon inter-

state commerce and upon equal protection of the law to persons in the several states is the test, and neither the name nor the aim of the state tax can suffice to prevent consideration by the supreme court of the United States of the necessary effect and consequences of the state statute." (Italics supplied.)

Finally, it is of profound importance that the view for which Appellant here contends has been unequivocally adopted by the American Law Institute in its Restatement of the Law of Conflict of Laws.[37]

"A state of the United States cannot compel a foreign corporation, as a condition of doing or continuing to do business in the state, to relinquish rights secured by the Constitution of the United States (Sec. 170).

* * * * *

"Under the Constitution of the United States, a state cannot make a condition of a foreign corporation's doing business in the state the payment of a tax which it could not constitutionally impose if the corporation had already been permitted to do business in the state" (Sec. 176).

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[37] Adopted and promulgated as the final draft on May 11, 1934.

IV

Virginia Stands Almost Alone in Use of Authorized Capital Stock as Measure.

(1) The Opinion Below.

Counsel for Appellee took the position, before the court below, that total authorized capital stock was "the only practical way"[38] by which a fee of this character could be measured. Apparently impressed with such an argument, the Virginia court commented as follows:

> "Indeed, if this entrance fee had not been paid at the time of entry it might never be paid. Insolvency might intervene. The petitioner might complete its work and withdraw before an assessment or levy could be made."[39]

As may readily be demonstrated, the great majority of the other States have found "practical" and satisfactory modes of measuring fees imposed upon foreign corporations for the privilege of doing a local business without resorting to authorized capital stock.

(2) Only Five Other States Employ Authorized Capital Stock as a Measure.

In 1910 when Section 207 of the Virginia Tax Code was enacted, *Western Union Telegraph Co.* v. *Kansas, supra,* had just been decided but not yet officially reported, and the measuring of charges upon both foreign

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[38] See brief on behalf of Commonwealth of Virginia, at page 45.
[39] *Atlantic Refining Co.* v. *Commonwealth, supra,* at page 493.

and domestic corporations by total authorized capital stock was then much in vogue. For twenty-five years since that date, the courts, with the exception of the confusion occasioned by the Baltic Company decision, have unanimously held invalid State statutes employing such mode of measurement. *Today only five States, other than Virginia, measure entrance fees by total authorized capital stock without apportioning such fee to local business or property.*[40]

With respect to annual fees, measured by authorized capital stock, Colorado, Idaho and Virginia now seem to be the only States which continue to so measure such charges upon *foreign* corporations, without apportioning the amounts thereof to local business or property.

We are unable to say how many State legislatures have followed the repeated warnings of the Supreme Court and *voluntarily* abandoned the use of authorized capital stock. From the cases discussed *supra*, it has been seen that the courts have compelled at least thirteen States *involuntarily* to adopt a mode of measurement as to foreign corporations which bears some relation to the privilege conferred, and which does not in effect tax property and commerce protected by the Constitution. This Court has rendered invalid the statutes of Arkansas, Kansas, Texas, Massachusetts, Ohio and Washington. And State supreme tribunals have held unconstitutional such

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[40] These States are Idaho (Sections 65-809, Idaho Code 1932), Mississippi (Sections 4137 and 4138, Code of 1930), Nebraska (Sections 24-222, Compiled Statutes, 1929), New Mexico (Sections 32-223, Compiled Laws, 1929), and North Carolina (Section 1181, as amended by Laws of 1935, c. 44). And the Nebraska statute above mentioned merely affords an *optional method* rarely followed. (Three other states use authorized capital as a measure, but apportion the charge to local business and/or property.)

statutes in California, Illinois, Missouri, Montana, South Carolina, Utah and Wisconsin.

It is manifest, therefore, that the fears of the court below are groundless, and that Virginia now finds itself among the last of the States to cling to the measurement of total authorized capital stock, without apportionment to local business or property.

Of course, Appellant is under no duty to point out to the Virginia Legislature a "practical" as well as a constitutional mode of measuring its fees. However, for the convenience of this Court, an examination has been made of the methods employed by several of the leading industrial States with respect to the imposition of entrance fees upon foreign corporations. The results of such examination are appended hereto as "Appendix A."

V

Summary and Conclusion

The statute here assailed, Section 207 of the Tax Code, was admittedly on the "border line" in 1918 because of its inevitable effect upon the interstate commerce of a foreign corporation having much of its property engaged in that commerce. However, its validity was then sustained in *General Railway Signal Co.* v. *Virginia, supra,* principally upon the authority of the *Baltic Mining Company Case.* Since 1918, subsequent decisions of this Court have "expressly disapproved" the *Baltic Mining Company Case* doctrine, and have also rendered ineffacious the two "characteristics" then said to save the validity of Section 207.[41]

In any event, the *General Railway Signal Company Case* did not involve or pass upon whether Section 207 violated the Fourteenth Amendment. Whether it deprived a foreign corporation of its property without due process or denied such a corporation the equal protection of the laws, were not passed upon in the *Signal Company Case.* However, these questions have been authoritatively determined by this Court in other decisions entirely applicable.

It has now become a settled principle of our jurisprudence that a fee measured by "the entire authorized capital of a foreign corporation doing both a local and interstate business in several States, although declared by the State imposing it to be merely a charge for the privilege of conducting a local business therein, is essentially and

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[41] *Alpha Portland Cement Co.* v. *Massachusetts, supra,* and *Cudahy Packing Co.* v. *Hinkle, supra.*

for every practical purposes a tax * * * on its entire property, including that in other States; and this because the capital stock of the corporation represents all its business of every class and all its property wherever located." [42]

Manifestly, under this settled principle, Appellant has been deprived of its property without due process by the exaction of this fee measured by its property in forty-six other States and several foreign countries. This is true regardless of whether the fee exacted unlawfully burdened interstate commerce,[43] as Appellant also contends.

Moreover, the decision in *Air-Way Electric Appliance Corp. v. Day, supra,* when taken in conjunction with the doctrine of unconstitutional conditions, requires that Section 207 be held invalid as denying to Appellant the equal protection of the laws. As such decision holds, "the mere number of authorized shares * * * is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount" of privilege fees.

Finally, Appellant submits that the numerous decisions by State appellate courts herein discussed, and which uniformly sustain the view that Section 207 is invalid as applied to Appellant, are entitled to be given persuasive weight by this Court. The opinion below cannot be sustained if these State court decisions have been correctly decided.

Accordingly, Appellant respectfully prays that the opinion below be reversed, and that a final judgment may be ordered directing a refund of said $5,000, with inter-

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[42] *International Paper Co.* v. *Massachusetts, supra,* at page 142; *Cudahy Packing Co.* v. *Hinkle, supra,* and numerous other authorities hereinbefore cited.

[43] *Frick* v. *Pennsylvania,* 268 U. S. 473.

est thereon at six percentum per annum from the 19th day of January, 1930, and with its proper costs expended in this proceeding.

Respectfully submitted,

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APPENDIX "A"

Examples of Methods Employed by Other States in Imposing Entrance Fees.

Without undertaking to discuss their constitutionality or to suggest that they are the most desirable methods, the following statutes from other jurisdictions afford interesting examples of ways to avoid the use of total authorized capital stock.

1. The New York statute involved in the case of *People* v. *Loughman*, 249 N. Y. 369,[44] suggests a simple method, which on its face appears to be entirely practical. There the statute, which was construed as imposing a pure entrance fee, read as follows:

> "Every foreign corporation, except banking corporations, fire, marine, casualty and life insurance companies, co-operative fraternal insurance companies, and building and loan associations, doing business in this state, shall pay for the use of the state, a license fee of one-eighth of one per centum for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state; to be computed upon the basis of the capital stock employed by it within this state, during the first year of carrying on its business in this state; which first payment shall not be less than ten dollars; and if *in* any year thereafter any such corporation shall employ more than eight thousand dollars of its capital stock within this state on which a license fee has not been paid then

[44] It will be remembered that the Virginia Court below relied on the *Loughman Case*. It is patent from the N. Y. statute above set forth, and from the opinion itself that such case in no way supports the validity of Section 207 of the Virginia Tax Code.

a license fee at the rate of one-eighth of one per centum shall be due and payable upon any such increase. The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any business within this state bears to the gross assets wherever employed in business. *On* the issued capital stock of any corporation issuing shares without designated monetary value *such corporation* shall pay for the use of the state a license fee of six cents on each such share employed in this state, as hereinbefore provided. For purposes of taxation, the capital of a corporation invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by such stock is located. The amount of capital upon which such license fees shall be paid shall be fixed by the state tax commission, which shall have the same authority to examine the books and records in this state of such foreign corporations, and the employees thereof as it has in the case of domestic corporations, and the state tax commission shall have the same power to issue a warrant for the collection of such license fees, as now exists with regard to domestic corporations. No action shall be maintained or recovery had in any of the courts in this state by such foreign corporation after thirteen months from the time of beginning such business within the state, without obtaining a receipt for the payment of the license fee upon the capital stock employed by it within this state during the first year of carrying on its business in this state."—Cahill's Consolidated Laws of New York, Annotated Supplement (1927), Chapter 61, Section 181.

In considering the nature and effect of the foregoing statute in the *Loughman Case,* the New York Court of Appeals said:

"The relator is a foreign corporation. The Legislature might have excluded it from the State.

* * * * *

"The State has admitted the relator subject to the condition that the corporation pay a license fee, just as a domestic corporation must pay an organization tax before it has any power to act. The measure of the tax adopted by the Legislature required postponement of the tax bill a year after the corporation began to do business. Only in that sense is such payment a condition subsequent. *The obligation to pay arose when the corporation began to do business in the State, and the effect of failure to meet that obligation results not merely in the revocation of authority previously granted by the State to do business here, but acts as a bar to enforcement, within the State, of contracts made in the course of such business. Essentially the tax constitutes the payment exacted for the privilege of entering into the State, even though in some particulars it is analogous to a franchise tax.*" (249 N. Y. 369.) (Italics supplied.)

It will be noted that the New York statute imposes a charge which becomes a binding obligation on the foreign corporation at the time it *enters*, but the determination of the amount of such charge is simply postponed until the end of the first year's business. At such time the corporation is able to report accurately to the Tax Commissioner the "gross assets employed in any business within" the State of New York, and in light of such information the amount of the entrance fee may be determined as prescribed by the statute. It is readily apparent that the New York method seeks to relate the amount of the charge to the value of the license or privilege conferred by the State. It will perhaps be interesting to apply concretely

the foregoing statute to a foreign corporation which has a total issued capital stock of $10,000,000, with gross assets everywhere of $25,000,000, and with gross assets in New York during the first year's business there of $2,500,000. Applying the formula of the New York statute to this situation, the entrance fee would be computed as follows:

$\frac{\$\ 2,500,000}{\$25,000,000} \times \$10,000,000 = \$1,000,000$ (Amount of capital stock employed within State)

$.00125\% \times \$1,000,000 = \$1,250$ (The amount of the entrance fee)

2. A second method is that now used in Illinois (which State formerly used total authorized capital stock as a measure) where an initial "license fee" is charged foreign corporations at the time of entrance into the State, as prescribed by the following statutes:

"Sec. 135. License fees payable by foreign corporations. The Secretary of State shall charge and collect from each foreign corporation authorized to transact business in this State the following license fees, computed on the basis and at the rates prescribed in this Act:

"(a) An initial license fee at the time of filing its application for a certificate of authority to transact business in this State.

"(b) An additional license fee at the time of filing (1) a report of the issuance of additional shares, or (2) a report of an increase in stated capital or paid-in surplus, or both, without the issuance of shares, or (3) a report of an exchange or reclassification of shares, whenever any such report discloses an increase in the sum of its stated capital and paid-in surplus

over the sum thereof last reported in any document, other than an annual report, required by this Act to be filed in the office of the Secretary of State.

"Sec. 136. *Basis of computation of license fees payable by foreign corporations. The basis for the initial license fee payable by a foreign corporation shall be the amount represented in this State, determined in accordance with the provisions of this section, of the sum of its stated capital and paid-in surplus.*

* * * * *

"For the purpose of determining the amount represented in this State of the sum of the stated capital and paid-in surplus of a foreign corporation. the amount represented in this State shall be that proportion of the sum of its stated capital and paid-in surplus which the sum of (1) the value of its property located in this State and (2) the gross amount of business transacted by it at or from places of business in this State bears to the sum of (1) the value of all of its property, wherever located, and (2) the gross amount of its business, wherever transacted.

"The proportion represented in this State of the sum of the stated capital and paid-in surplus of a foreign corporation shall be determined from information contained in the latest annual report filed by the corporation, or, if no annual report has been filed, from information contained in the application of the corporation for a certificate of authority to transact business in this State, or, in case of a merger, from information contained in the report of the surviving corporation of the amount of its stated capital and paid-in surplus following the merger.". (Illinois Acts 1933, p. 376, 377). (Italics supplied.)

In addition to the foregoing initial entrance fee, an annual franchise tax is also imposed upon foreign corporations and computed in substantially the same fashion as is the initial fee.

3. Following the mandate of the Supreme Court in the decision of *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460, the State of Washington abandoned its filing or entrance fee measured by total authorized capital stock and enacted the following statute:

> "All foreign corporations doing intrastate business, or hereafter seeking to do intrastate business in the State of Washington shall pay for the privilege of so doing the same fees as are prescribed in section one (1) hereof for the filing of articles of incorporation of a domestic corporation, such fees to be computed upon the portion of capital stock of such corporation represented or to be represented in the State of Washington, to be ascertained by comparing the value in money of its entire property and capital with the value in money of its property and capital in, or to be brought into, and used in this State * * *" (L. 1929, Ch. 227, Sec. 2).

It thus appears that Illinois and Washington undertake to collect initial entrance fees at the time the corporation enters rather than at the end of the first year as does New York. Such fees are measured by the property to be used within Illinois and Washington, the corporation seeking admission apparently being required to submit, in its application, an estimate of such property. No study has been made to ascertain the precise manner in which the Illinois and Washington methods operate in practice, but it is apparent that a corporation seeking to enter will ordinarily be able to furnish reliable information as to its

anticipated activity in the State for the first year. Consider, for example, the case presently involved where Appellant was simply taking over the business and property in Virginia of its subsidiaries.

4. A fourth method, having the virtue of simplicity and believed to be used in many States, is that employed by Maryland. Article 23, Section 119, of the Annotated Code of Maryland (1924), provides that:

> "At the time of original qualification and filing of the original papers required by this section, every such foreign corporation shall pay to the State Tax Commission, for the use of the State, a fee of twenty-five dollars, upon receipt of which the Secretary of the State Tax Commission shall issue to it a certificate setting forth that it is entitled to do business in this State * * *."

The foregoing flat fee of $25.00 appears to be the only fee required of foreign corporations by Maryland at the time of entrance, and that thereafter such corporations are required to pay "an annual franchise tax" as prescribed by the following statute:

> *"Every foreign corporation,* except insurance companies of all classes, and corporations subject to a franchise tax measured by gross receipts, which maintains an office or place of business and exercises its franchises in this State, shall pay to the State Treasurer, *for the use of the State, an annual franchise tax upon the amount of capital employed by it in this State on the preceding first day of January,* as determined by the State Tax Commission at the following rates, that is to say: The sum of twenty-five dollars for every fifty thousand dollars, or frac-

tional part thereof of capital employed by it in this State up to five hundred thousand dollars—but in no case less than twenty-five dollars; if the amount of such capital is more than five hundred thousand dollars, and not more than five million dollars, then an additional amount equal to one-fortieth of one per cent on the excess; and if more than five million dollars, then an additional amount at the rate of thirty dollars for every million dollars of such last named excess. The State Tax Commission after ascertaining the amount of capital employed in this State by each foreign corporation shall certify the same, together with the amount of franchise tax due thereon by the corporation, to the Comptroller of the Treasury, who shall at once proceed to collect said tax, which shall be collectible by him and payable to the Treasurer of Maryland in the same manner as is now or may hereafter be prescribed by law for the collection and payment of taxes to the Comptroller of the Treasury by other corporations. If the franchise tax imposed on any foreign corporation shall not be paid by the first day of November in the year for which such tax is imposed, if on that date thirty days shall have elapsed since the rendition of a bill for such tax by the Comptroller of the Treasury and, if not, then at the expiration of said thirty days' period, any and all defaulting foreign corporations shall forfeit the right to do business in this State until all taxes due are paid, as well as any interest or charge thereon and in addition be subject to the penalty prescribed by Section 121 of this Article." (Article 23, Section 122.)

Statutes from other States would present some variations of the methods employed by New York, Illinois, Washington and Maryland, but the foregoing are sufficient to indicate typical methods used by other States, and to point out the fundamental principle underlying the

manner in which other States avoid the use of *total* authorized capital stock as a measure. *This principle is that the charge imposed should be related to the license or privilege conferred and hence, unless a nominal initial fee is charged as in Maryland, its amount must be determined and measured by property and/or business within the State.*